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# FORMS OF PLEADINGS

IN

## CIVIL SUITS

ADAPTED TO

### THE PRACTICE IN INDIA,

WITH NOTES

AND

RULINGS OF THE HIGH COURTS IN INDIA,

OF THE PRIVY COUNCIL,

AND OF THE SUPREME COURT IN ENGLAND.

---

BY

A. DE MORNAY BIDOULAC,

ADVOCATE.

---

Calcutta:

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## PREFACE.

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THESE forms have been collected from various sources, English, Indian, and American, principally the latter; they are not original. Where necessary, I have added to or altered the forms selected in order to adapt them to the practice in this country.

My object mainly has been to collect in one publication a body of forms, with notes and an index, so that practitioners in the country courts, who, as a rule, have not had the advantage of much practical legal training, may readily find a form suited to the case it may be desired to launch. But even to the trained practitioner the work will be found, it is believed, most useful from the copious index, giving them the means of at once turning to the form desired.

I have been unable to make the notes as full as I had intended, and the decisions which may be properly stated to affect or decide the sufficiency or correctness of pleadings are not numerous, but the main and most essential ones will be found noted.

A. DEMORNAY BIDOULAC.

*January 1, 1887.*



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# PART I.—PLAINTS.

## FIRST DIVISION.

### SUITS BY AND AGAINST PARTICULAR PERSONS, INDIVIDUALLY, AND IN REPRESENTATIVE CHARACTER.

#### CHAPTER I.

##### ASSIGNEES AND DIVISEES.

###### Form No. 1.

###### By THE ASSIGNEE OF A CLAIM,

Plaintiff states:—

1. (State cause of action according to the plaintiff's assignor.)
2. That on the       day of       18       , at       , the said A B assigned the said claim to plaintiff.

###### Form No. 2.

###### By THE ASSIGNEE OF A DEBT,

Plaintiff states:—

1. That, before the making of the assignment hereinafter mentioned, an agreement in writing, bearing date the       day of 18       , was made between A B and the defendant, whereby it was agreed that the said A B should build for the defendant a dog-cart according to the specifications therein mentioned for the price of Rs.       , to be paid upon completion and delivery of the said dog-cart.

2. That on the       day of       18       , the said A B duly completed and delivered to the defendant the said dog-cart, and thereupon the said sum of Rs.       became due and payable by the defendant to him.

3. That on the       day of       18       , by an instrument in writing, the said A B assigned to the plaintiff absolutely the said sum of Rs.       , then due and payable by the defendant to the said A B as aforesaid.

4. That the defendant has not paid the said sum, and the same remains wholly due and unpaid.

**Assignment of Choses in Action.**—At Common law a chose in action was not, with certain exceptions, assignable; in Equity, however, the Court regarded such assignments as agreements by the assignor to sue at law in his name, and compelled the assignor, when the assignment was for valuable consideration, to allow his name to be used upon receiving a proper indemnity; but in this country a chose in action has always been assignable when there is neither fraud against individuals, nor special violation of the rule of public policy,\* and the assignee can sue in his own name,† and not only can a cause of action be assigned, but also the liability to be sued. In *Bhawani Churn v. Mitter*,‡ the Calcutta High Court held that by the law of this country the right of action to recover a debt is capable of being legally assigned so as to give the assignee a remedy by action at law, and there seemed to be no reason why the liability of the debtor should not also be assignable.

**Effect of Assignment.**—The party liable, after notice of assignment, cannot pay the assignor, but he may set-off against the assignee claims subsisting against the assignor at the date of the receipt of notice.

**Necessary Averments.**—The character of assignee must be averred as well as stated in the title when the plaintiff sues in that capacity; but the form of the assignment, or the consideration thereof, need not be stated.

**Equitable Assignments.**—A mere order or request to a debtor to pay a third party, not communicated to such third party, is not an equitable assignment.§ A cheque is not an equitable assignment of the fund, or any part of the fund, drawn upon.|| Where a person gave his solicitors a power of attorney to receive all monies coming due under a decree, and by a letter authorized them, after satisfying their own claims out of the money to be received, to pay the balance to the plaintiff, and the solicitors, in the presence of the plaintiff, agreed to draw the money and pay the plaintiff, it was held to be a valid equitable assignment, and the judgment-debtor having paid the decree out of Court, the person receiving it was bound to refund to the plaintiff.¶

\* *Hurrinath Muszoomdar v. Moran and Co.*, W. R. 1864, 127.

† *Kanshayalal v. Domingo*, I. L. R., 1 All. 732.

‡ Ben. F. B. Rep. 54.

§ *Scott v. Porchee*, 3 Mer. 652.

|| *Hopkinson v. Forster*, L. R., 19 Eq. 74.

¶ *Shair Mull v. Singaravelar*, I. L. R., 6 Mad. 294.

**Assignments of Claims arising from Wrongs.**—In determining what causes of action arising from wrongs are assignable, the criterion is whether it is one which would survive to the representative of a decedent, in which case it is assignable, otherwise not. As to mere personal injuries, such as libel and slander, the maxim of the Common law, "*Actio personalis moritur cum persona*," applies. The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not assignable.\*

**Assignment of Mortgage.**—In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment; but such transfer must be without prejudice to the rights of the mortgagor.†

**Assignment of Bill of Lading.**—The indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.‡

**Assignment of Policies.**—Every assignee, by endorsement or otherwise, of a policy of marine insurance, or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the time of the assignment, shall have transferred to, and vested in, him, all rights of suit as if the contract contained in the policy had been made with himself.§

**Assignment of Non-negotiable Instruments.**—The assignee of a non-negotiable instrument can sue thereon in his own name;|| and the obligor's consent is not necessary to the assignment.¶

**Assignment how made.**—Any act amounting to an appropriation of a debt, or whereby one person's interest in a chose in action passes to another, constitutes an assignment; but in those provinces where the Transfer of Property Act, 1882, applies, a transfer of a debt, or of any beneficial interest in moveable property, does not operate against the debtor or against the person in whom the property is vested, until express notice in writing, signed by the person making the transfer, or by his agent, of the transfer, is given to him, unless he is a party to, or otherwise aware of, such transfer.\*\*

### Form No. 3.

#### BY ASSIGNEE WHERE PLAINTIFF IS TRUSTEE.

Plaintiff states:—

I. (State cause of action accrued to the assignor.)

\* *Pragi Lal v. Fateh Chand*, I. L. R., 5 All. 207.

† *Chinnaya Rawutan v. Uhedambaram Chetti*, I. L. R., 2 Mad. 212.

‡ Act IX. of 1856, s. 1.

§ Act V. of 1866, s. 15.

|| *Kanhaiya Lal v. Domingo*, I. L. R., 1 All. 732.

¶ *Krista Chetti v. Balarma Chetti*, I M. H. C. A. C. 139.

\*\* Sections 131, 132.



## CHAP. II.—CORPORATIONS.

2. That on the      day of      18. , the said O D assigned all his property (including the said claim) to the plaintiff in trust for the purpose of (state the purpose).

*[Demand of judgment.]*

### Form No. 4.

#### WHERE PLAINTIFF IS A DEVISEE.

Plaintiff states:—

1. (State cause of action accrued to deceased.)

2. That the said A B was seized of the estate hereinbefore mentioned, and that he died on the      day of      18 , at      , and by his last will devised the same to this plaintiff.

*[Demand of judgment.]*

### Form No. 5.

#### BY ASSIGNEE FOR THE BENEFIT OF CREDITORS.

Plaintiff states:—

1. (State cause of action accrued to the assignor.)

2. That on the      day of      18 , at      , the said A B assigned all his property (including the said claim) to the plaintiff (in trust for the purpose of paying all his debts).

*[Demand of judgment.]*

## CHAPTER II.

## CORPORATIONS.

### Form No. 6.

#### BY A FOREIGN CORPORATION.

Plaintiffs state:—

1. That they are a corporation organized and existing under the laws of (state the country) for the purpose of (here state the purpose), and are doing business as such in its said corporate name,

2. (State cause of action.)

**Corporation How to Sue.**—A corporation must sue and be sued in its corporate name ;\* it cannot be sued through its agent.† Where a corporation sole has a name of dignity, he should sue and be sued in that name ; his own Christian name being prefixed to his name of office, as for instance, " John, Lord Bishop of . " In the case of an unincorporated or unregistered company, the individual members must sue and be sued ; but if a plaintiff does not know the names of the persons composing it, he may sue them in the name in which they carry on business, stating in his plaint his inability to describe them better.‡ The proper style of a Municipal Corporation is " The Municipality of the Town of , represented by their President, A B."

**Foreign Corporations.**—A Foreign Corporation, duly created according to the laws of a Foreign State recognized by Her Majesty, may sue and be sued by its corporate name ; but the fact of its incorporation, according to the laws of the Foreign State, must be proved, unless admitted.§

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Form No. 7.

BY OR AGAINST A DOMESTIC CORPORATION.

Plaintiff states :—

1. That they are a company incorporated by and under the provisions of the Indian Companies' Act, 1832 (or the Joint Stock Companies' Act, 1857, or Act VII. of 1860, or Act X. of 1866, as the case may be), and as such doing business in its corporate name of (insert name of company), (or that the defendants are a company incorporated by and under the provisions of the Indian Companies' Act, 1832).

2. (State cause of action.)

**Applicability of Companies' Act, 1832.**—By section 221, the Indian Companies' Act, 1832, is made applicable to companies formed under Acts XIX. of 1857 and VII. of 1860.

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\* *Ram Dass Sein v. Stephenson*, 10 W. R. 366.

† *Nobin Chunder Paul v. Stephenson*, 15 W. R. 534.

‡ *Koylash Chunder Roy v. Ellis*, 8 W. R. 45 ; *Cannan v. Koylash Chunder Roy*, 25 W. R. 117.

§ *National Bank of St. Charles v. De Bernales*, 1 O. & P. 569 ; *General Steam Navigation Co. v. Guillon*, 11 M. & W. 877 ; *Bank of Scotland v. Ker*, 8 Sim. 246 ; *Lewis v. Baldwin*, 11 Beav. 153 ; *Buenos Ayres Railway Co. v. Northern Railway Co.*, 2 Q. B. D. 210.

**Unregistered Associations.**—An unregistered association has *per se* no status in law to warrant its instituting a suit in its own name by its Secretary; but if the association empower one or more of its members to act for it in the matter of the suit in the manner provided by section 30 of the Civil Procedure Code, the permission mentioned in that section might be granted.\*

**Liability of Corporations for Wrongs.**—An action will lie against a corporation for a wrong which they cause to be committed; and the authority of their agent may be sufficiently proved against a corporation without showing an appointment under seal.†

## CHAPTER III.

### EXECUTORS AND ADMINISTRATORS.

#### Form No. 8.

#### BY AN EXECUTOR.

A B, Executor of the

Will of C D, deceased ... *Plaintiff.*

*versus*

JOHN DOE ... *Defendant.*

Plaintiff states;—

1. (State cause of action.)

2. That the said C D in his life-time made his last will, whereby he appointed the plaintiff executor thereof.

3. That on the      day of      18      , at      , the said C D died.

4. That on the      day of      18      , at      , the said will was proved and admitted to probate in the Court of      .

5. That thereupon, on the      day of      18      , probate of the said will was granted to the plaintiff.

\* The Mahomedan Association of Meerut v. Bakshi Ram, I. L. R., 6 All. 284.

† Yarrowborough v. Bank of England, 16 East. 6; Smith v. Birmingham Gas Co., 1 A. & E. 526; Maund v. The M. & S. Canal Co., 2 Dowl. N. S. 113; Eastern Counties Railway Co. v. Brown, 6 Ex. 314; Goff v. G. N. R. Co., 3 E. & E. 672; 30 L. J., Q. B., 148; Met. Asylum Dist. v. Hill, 6 App. Cas. 193; 50 L. J., H. L., 353; and see Mill v. Hawker, L. R., 9 Ex. 309; L. R., 10 Ex. 92; 43 L. J., Ex., 129.

Form No. 9.

BY AN ADMINISTRATOR.

Plaintiff states:—

1. (State cause of action accruing to the intestate.)

2. That on the       day of       18   , at       , the said A B died intestate.

3. That on the       day of       18   , letters of administration, to the estate of the said A B were issued by the Court of       to the plaintiff.

**Necessary Averments.**—When the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it ;\* therefore, when the plaintiff sues as executor or administrator, he must allege that he has proved the will, or taken out administration to the estate.

**Parties.**—When there are several executors or administrators, they should all be made parties to a suit against one or more of them.†

**Survivorship of Representation.**—When probate has been granted to several executors, and one dies, the entire representation of the testator accrues to the surviving executor or executors.‡

**When Executors or Administrators may sue.**—No right as executor can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under section 180 of the Succession Act, 1865, and no right to any property of a deceased person, who has died intestate, can be established in any Court of Justice, unless letters of administration have been first granted by a Court of competent jurisdiction. Section 180 provides that when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

**Effect of Probate and Letters of Administration.**—An executor or administrator of a deceased person is his legal representative for *all* purposes, and *all* the property of deceased vests in him as such ;§ and probate or letters of administration shall be conclusive as to the representative title against all debtors of the

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\* Civil Procedure Code, s. 50.

† Civil Procedure Code, s. 438.

‡ Succession Act, 1865, ss. 186 and 190; and Probate and Administration Act, 1881, s. 11.

§ Succession Act, 1865, s. 179, and Probate and Administration Act, 1881, s. 4.

### 8 CHAP. III.—EXECUTORS AND ADMINISTRATORS.

deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.\*

**Administration during Pending Suit.**—When there is no executor or administrator of a person dying during the pendency of suit, an administrator may be appointed to represent the deceased in that suit only, who may be the nominee of a party to the suit.†

**Survival of Rights of Action for Wrongs.**—All rights of action for wrongs survive to, and against, the executor or administrator of a deceased person, except suits for defamation, and for injuries to the person not causing death;‡ and when death is caused by the wrongful act, the representative may sue under Act XII. of 1855.

**Execution.**—In suits against the representatives of a deceased person, execution may issue against the immoveable property of such deceased person in the same manner as in his lifetime.§

**Limitation.**—In suits by executors, administrators, or representatives, under Act XII. of 1855, one year, from the date of the death of the person wronged;|| and against them under the same Act, two years, from the time when the wrong complained of is done.¶

**Certificates to Collect Debts.**—No debtor of any person deceased shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate granted under Act XXVII. of 1860, or of a probate or letters of administration, unless the Court shall be of opinion that the payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled;\*\* it is not an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate that such legal representative should first obtain a certificate under Act XXVII. of 1860; but if the Court considers that the debtor has grounds for a "reasonable doubt" as to the party entitled, it may refuse to issue any compulsory process to enforce payment, until the plaintiff has obtained the requisite certificate.††

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\* Succession Act, 1865, s. 242.

† Succession Act, 1865, s. 222.

‡ Succession Act, 1865, s. 263, and Probate and Administration Act, 1881, s. 80, and Act XII. of 1855.

§ 9 Geo. IV., c. 38, s. 4.

|| Art. 20, Limitation Act, 1877.

¶ Art. 33, Limitation Act, 1877.

\*\* Act XXVII. of 1860, s. 2.

†† *Lachmin v. Gaya Prasad*, I. L. R., 4 All. 425.

**Certificate Conclusivè as to Representative Character.**—A certificate under Act XXVII. of 1860 is, under section 4 of the Act, conclusivè of the representative character, and a full indemnity to all persons paying their debts to him.\*

**Effect of Certificate.**—A certificate under Act XXVII. of 1860 gives no title to the property in succession to the deceased, neither does it authorize the holder to sue for and collect debts which have accrued due after death of the deceased to persons who have subsequently become owners of his property.†

### Form No. 10.

#### AGAINST AN EXECUTOR OR ADMINISTRATOR.

Plaintiff states :—

1. (State cause of action against the decedent.)
2. (Allege death of decedent, and defendant's appointment as executor or administrator, as in preceding forms.)
3. That said defendant as such executor (or administrator), in pursuance of an order of the Court of \_\_\_\_\_, caused a notice to the creditors of said deceased to be published in \_\_\_\_\_, the same being newspapers designated by said Court, requiring all persons having claims against said deceased to exhibit them with the necessary vouchers to the said executor (or administrator) at (specify the place) within \_\_\_\_\_ months after the first publication of said notice ; that said notice was first published on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.
4. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, the claim hereinbefore set forth, and upon which this suit is founded, was duly presented in writing by the plaintiff to the defendant as such executor (or administrator) for allowance ; and that the same was by him rejected on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

**Practice.**—An executor or administrator is not liable for claims of which he had no notice at the time of distribution, provided he has published the notice required by section 320 of the Succession Act, 1865.

**When Suit lies.**—A plaintiff is entitled to sue the legal representative of his deceased debtor, and to obtain a decree against him, without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed.†

\* *Gaura v. Gayadin*, I. L. R., 4 All. 355.

† *Gaurée Byjnath v. Mussumut Lochun*, 22 W. R. 102; *Mussumut Jhanjoo v. Mussumut Damunah*, 17 W. R. 348.

**Form of Decree.**—The decree should mention that it is against the defendant in the character of representative of the deceased, and should be executed as directed by section 252 of the Civil Procedure Code.\*

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## CHAPTER IV.

### INSANE PERSONS.

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#### Form No. II.

##### BY AN INSANE PERSON SUING BY HIS GUARDIAN.

A B, residing at \_\_\_\_\_, a person of unsound mind,  
by his guardian C D, residing at \_\_\_\_\_ ... *Plaintiff*,  
*versus*  
E F \_\_\_\_\_ ... *Defendant*.

Plaintiff states:—

1. (State the cause of action.)
2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, in the Court of \_\_\_\_\_, the said A B was adjudged to be of unsound mind and incapable of managing his affairs.
3. That afterwards on the same day (or on the \_\_\_\_\_ day of 18 \_\_\_\_\_), the said Court appointed the above-named C D the guardian of the person and estate of the said A B.

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#### Form No. 12.

##### AGAINST THE GUARDIAN OF AN INSANE PERSON.

A B, residing at \_\_\_\_\_ ... *Plaintiff*,  
*versus*  
C D, residing at \_\_\_\_\_, guardian of E F, a person  
of unsound mind ... *Defendant*.

Plaintiff states:—

1. (State the cause of action against the insane person.)
2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, the said E F was adjudged by the Court of \_\_\_\_\_ to be a person of unsound mind.

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\* Girdharlal v. Baishio, I. L. R., 8 Bom. 309.

3. That the defendant was, on the            day of            18    , appointed by the said Court guardian of the person and estate of the said E F, and that he the defendant accepted said appointment, and is now such guardian.

Wherefore plaintiff prays for judgment and decree for Rs.            and all costs of suit to be paid out of the estate of the said E F in the hands of the defendant.

**Definitions.**—The term “unsound mind” in section 1 of Act XXXIV. of 1858 comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease.\* “Lunatic” means any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs; and “person of unsound mind” means any person, not a minor, who, not having been found a lunatic, shall be incapable, from infirmity of mind, to manage his own affairs.†

**Presumption as to Sanity.**—There is a presumption in the first instance in favour of sanity; but general lunacy being established, the onus lies on the party alleging a lucid interval to prove not merely a cessation of violent symptoms, but a restoration of mind sufficient to enable the party to judge correctly of his act.‡

**Drunkenness.**—So far as the ability to contract is concerned, drunkenness is classed with insanity.§

**Liability of Insane Persons.**—In England, if the plaintiff was ignorant of the insanity, and the transaction was fair and *bona fide* on his part, the contract will be valid,|| but here all agreements with persons of unsound mind are absolutely void. In any case, however, the *property* of an insane person is liable for necessities supplied to him, or to any one whom he is legally bound to support.¶

**Practice.**—A guardian *ad litem* cannot be appointed under Chapter XXXI. of the Code of Civil Procedure for a lunatic defendant to whom Act XXXV. of 1858 applies, until the defendant has been adjudged a lunatic under the provisions of that Act.\*\*

\* In the matter of Cowasjee Baramjee, I. L. R., 7 Bom. 15.

† Trustee Act, 1866, s. 2.

‡ Hall v. Warren, 9 Ves. 611.

§ Contract Act, 1872, s. 12, ill. (b).

|| Mollon v. Camroux, 2 Ex. 487; 4 Ex. 17; Read v. Leggard, 6 Ex. 687; L. J. 20 Ex. 309; Beaven v. McDonnell, L. J. 23 Ex. 326; 9 Ex. 309.

¶ Contract Act, 1872, s. 68.

\*\* Jonnagadia Sabbaya v. Thatipaithi, I. L. R., 6 Mad. 380.



## 12 CHAP. V.—JOINT TENANTS & TENANTS IN COMMON.

A person who was appointed manager of a lunatic's affairs by consent obtained while she was of sound mind, and who is capable of making a defence on her behalf, is competent to represent her in a suit, although not appointed under the law as representative of the insane.\*

Where a *curator bonis*, duly appointed in Scotland to a person absent from India on leave, prayed through his attorney, among other things, for an order authorizing him to draw certain moneys belonging to that person, and filed a "Court of Session Extract" of the "act of decree," whereby the said *curator bonis* was appointed, the Court refused the order, as there was no evidence that the person was of unsound mind and incapable of managing his affairs, or that the curator had given security, or that funds were required for the maintenance of the alleged insane person.†

A person alleged to be a lunatic, though not found so under Act XXXV. of 1858, may appear in person or by vakil.‡ Chapter XXXI. of the Code does not apply to such persons.

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### CHAPTER V.

#### JOINT TENANTS AND TENANTS IN COMMON.

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##### Form No. 13.

##### BY JOINT TENANTS AND TENANTS IN COMMON.

Plaintiff states :—

1. That the property hereinafter mentioned and described is owned in common by the plaintiffs.

2. (State cause of action.)

*[Demand of judgment.]*

**Parties.**—All the members of a joint family should sue together ; those only who refuse should be made defendants.§

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\* *Kala Chund v. Sreemutty*, 22 W. R. 23.

† In the matter of *J. T. Welsh*, 1 L. R., 8 Bom. 280.

‡ *Uma Sundari v. Ramji Haldar*, 1 L. R., 7 Cal. 242.

§ *Rajaram Tewari v. Luchmun Pershad*, 12 W. R. 478.

CHAPTER VI.

MINORS.

Form No. 14.

BY A MINOR SUING BY GUARDIAN APPOINTED UNDER  
ACT XL. OF 1858.

A B, a minor residing at \_\_\_\_\_, by C D, his guardian... Plaintiff,  
*versus*

E F ... .. Defendant.

Plaintiff states:—

1. That he is under eighteen years of age.
2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the above-named C D was  
duly appointed by the Court of \_\_\_\_\_ guardian of the property and  
person of the plaintiff.
3. (State cause of action.)

Form No. 15.

BY A EUROPEAN BRITISH MINOR SUING BY GUARDIAN  
APPOINTED UNDER ACT XIII. OF 1874.

Plaintiff states:—

1. That he is a European British subject, and under eighteen years  
of age.
2. That G H, plaintiff's father (or mother), by his will (or other  
instrument, as the case may be), duly proved and admitted to probate  
in the Court of \_\_\_\_\_, appointed the said C D guardian of the person  
and property of the plaintiff (or that, on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_,  
the above-named C D was duly appointed by the Court of  
guardian of the person and property of plaintiff).
3. (State cause of action.)

**BY A MINOR SUING BY HIS GUARDIAN *ad litem*.**

**Plaintiff states :—**

- Practice.**—A minor must be represented by an adult person, who is called his next friend, and is appointed by the Court, except where there is a guardian duly appointed by law ;<sup>o</sup> and no person shall be entitled to institute or defend any suit connected with the estate of a minor, until he shall have obtained a certificate of administration, unless with the leave of the Court when the property is of small value, or for any sufficient reason. A volunteer guardian has no right to sue on behalf of a minor ; the accord or refusal of permission to sue is a matter in the discretion of the Court ;† the mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded ;‡ but where the uncle of a minor instituted a suit on his behalf without obtaining the formal permission of the Court, and the uncle's right to sue was denied by the defendant, and the first issue framed was whether he had such right, and the Court decided that he had such right, it was held that although permission to sue, or defend a suit, on behalf of a minor, should be formally granted to be of effect, such decision might be fairly accepted as a sufficient and effective permission to the uncle to sue, and he was competent to maintain such suit ;§ and so also where the suit was for property of small value, and the defendant raised no objection in the Court of first instance, and the suit was decided in favour of the minor, it must be taken, under the circumstances, that the suit was instituted with the Court's permission.|| And where the mother of a minor, who did not hold a certificate under Act XL. of 1858, was sued on behalf of the minor, and she did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor, it was held, under the circumstances, that it must be inferred that the Court had given her permission to defend the suit.¶

¶ *Janki v. Dharam Chand*, I. L. R., 4 All. 177.

The effect of section 3 of Act XL. of 1858, read with section 440 of the Code of Civil Procedure, is, that a minor plaintiff must not always sue by his next friend ; but when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the Court for the suit to proceed.\*

**Who may be Guardian ad litem.**—Any person, being of sound mind and full age, may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.†

**Female Minors (Bengal).**—In Bengal, the effect of section 21 of Regulation X. of 1793, and section 27 of Act XL. of 1858, is, that no person, other than a female, shall in *any case* be entrusted with the guardianship of a female minor.‡

**Duty of Guardian.**—It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer, if a notion were to prevail that guardians are bound, for their own security, to contest all claims against an infant's estate, whether well or ill-founded.§

**Powers of Guardian over Suit.**—By section 462 of the Civil Procedure Code, the next friend, or guardian *ad litem*, cannot compromise the suit without the leave of the Court ; and such leave must be actually, expressly, and not impliedly, given ; and the terms of the section are not sufficiently complied with by the Court passing a decree in the terms of the compromise presented by the guardian *ad litem*.||

A Court should not make a decree by consent against a minor without ascertaining that it is for the benefit of the infant that such a decree should be pronounced.¶

And if the decree is for immoveable property, and the next friend is a person holding a certificate under Act XL. of 1858, the consent of the Court granting the certificate is also necessary.\*\*

**Liability of Minors.**—The property of a minor is liable, though he is not personally liable, upon contracts made by himself for the supply to him of "necessaries," under which term are included not only the actual necessities of life, but also such things as are suitable to his station in life, and to his particular circum-

\* *Durga Churn v. Nilmoney Dass*, I. L. R., 10 Cal. 134.

† Civil Procedure Code, s. 445.

‡ *Fusheehun v. Kajo*, I. L. R., 10 Cal. 15.

§ *Baboo Lekraj Roy v. Baboo Mahtab Chund*, 17 W. R. 117.

|| *Raja Gopal v. Muttapallum Chetti*, I. L. R., 3 Mad. 103.

¶ *Ramohurn Raha v. Mungal Sircar*, 16 W. R. 232.

\*\* *Sheonundun Singh v. Mussamut Kahsa*, 6 All. 179.

stances at the time ; his estate is also liable for necessities supplied to any one whom he is legally bound to support.\* As to what are necessities, see the cases cited below.†

A minor is as much bound by a judgment in his own action as if he were of full age.‡

**How Minor may set aside Decree.**—Where a minor is, through his guardian, a party to a suit which, on attaining his majority, he finds has prejudiced his interests, his proper course is, no doubt, to apply for a review of judgment ; but when the prejudice to his interests arises from transactions growing out of that suit, and is of such a nature that a mere review of judgment would prove utterly ineffectual, his only remedy is to proceed against the persons in possession of his rights, making his guardian, through whom they have passed to those persons, a co-defendant with them.§

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## CHAPTER VII.

### PARTNERS.

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#### Form No. 17.

#### AGAINST PARTNERS.

Plaintiff states :—

1. That at the time hereinafter mentioned the defendants were partners, and doing business as merchants (or traders or otherwise) at \_\_\_\_\_, under the firm name of A B & Co.

2. (State cause of action.)

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#### Form No. 18.

#### BY A SURVIVING PARTNER.

Plaintiff states :—

1. That at the time hereinafter mentioned the plaintiff and one C D were partners, doing business as merchants (or traders or otherwise) at \_\_\_\_\_ under the firm name of A B & Co.

2. (State cause of action.)

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\* Contract Act, 1872, s. 68.

† Chapple v. Cooper, 13 M. and W. 252, 256 ; Rydu v. Woombwell, L. R. 3 Ex. 90 ; Watkins v. Dhunnoo Baboo, I. L. R., 7 Cal. 140.

‡ Modhoo Soodun v. Rajah Prithoe, 16 W. R. 231 : see also Grish Chunder v. Miller, 3 C. L. R. 17.

§ Dabee Dutt v. Subodra Bibee, 24 W. R. 449.

3. That on the       day of       18   , the said C D died, leaving the plaintiff the sole survivor of the said firm.

**Practice.**—Where the title of a cause contains no other designation of the party plaintiff than the name of the firm, it is defective.

**Suits between Partners.**—Partners cannot sue one another ; they can only ask for a dissolution and accounting.

**Attachment of Partnership Property.**—Property belonging to a partnership cannot be seized in execution of a decree against one partner only. Accordingly, where a suit was brought against one partner only, and the decree made him alone liable, it was held that only his property could be attached in execution of that decree. The proper course for a partner, seeking to remove an attachment on partnership property in execution of a decree against one partner only, is to sue for a dissolution of the partnership, and an accounting with a view to ascertain the amount due to the partner in execution against whom the partnership property is attached.\*

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#### Form No. 19.

#### AGAINST A NEW FIRM FOR THE DEBT OF A FORMER FIRM WHICH THE NEW FIRM HAVE TAKEN UPON THEMSELVES.

Plaintiff states :—

1. That defendants C D & E F are partners, carrying on, under the firm name of Z & Co., at       , the business of merchants, which was formerly carried on there by C D & G H under the firm name of X. & Co.

2. (State the cause of action against the former firm.)

3. That on the       day of       18   , the said partnership, which up to that time existed between C D & G H in the said business, was dissolved by mutual consent (or as the case may be).

4. That the said business was thenceforth carried on by the defendants C D and E F, the said G H thenceforth ceasing to have any interest in the said business.

5. That afterwards, on the       day of       18   , it was agreed by word of mouth (or in writing, or if by implied contract, state the agreement as a fact) between plaintiffs and the defendants, and the

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\* Karimbhai v. The Conservator of Forests, I. L. R., 4 Bom. 223.

said G H, that the defendants should become liable to the plaintiff for the re-payment of the said loan of Rs.                      and the interest thereon to the plaintiff, and that G H should be discharged from all liability in respect thereof.

6: That defendants have not re-paid the said loan.

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## CHAPTER VIII.

### PUBLIC OFFICERS.

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#### Form No. 20.

#### AGAINST BAILIFF FOR NOT EXECUTING WARRANT OF ATTACHMENT.

Plaintiff states:—

1. That at the time of issuing the execution hereinafter mentioned the defendant was Bailiff of the Court of                      .

2. That on the              day of              18              , decree was passed in a suit in the said Court in favour of the plaintiff against one E F for Rs.              .

3. That on the              day of              18              , a warrant of attachment against the property of the said E F was issued upon the said decree, and directed and delivered to the defendant as Bailiff aforesaid.

4. That on that day, and during a reasonable time afterwards, the said E F had (a large quantity of general merchandize) in his shop, No.              , Merchant Street, Rangoon, out of which the said decree might have been satisfied, of which the defendant had notice.

5. That he refused and neglected to attach the said property or any part thereof (or as the case may be; and if he attaches a part, specify it) as by said warrant he was required to do.

6. That by reason of the premises, the plaintiff has been unable to obtain the said money, and is likely to lose the same.

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#### Form No. 21.

#### AGAINST BAILIFF FOR NOT EXECUTING WARRANT OF ARREST.

1 & 2. (Allege as in preceding form.)

3. That on the              day of              18              , a warrant of arrest of the person of the said E F was issued upon the said decree, and directed and delivered to the defendant as Bailiff aforesaid.

4. That the defendant, well knowing that the said E F was then at \_\_\_\_\_, neglected to execute said warrant, and falsely and deceitfully returned on the same that the said E F was not to be found.

**Government.**—The Government can sue and be sued under the style of "The Secretary of State for India in Council."\*

**Foreign State.**—Any Foreign State or Sovereign is entitled to sue in our Courts, in their recognized names, to enforce the private rights of the head or of the subjects of the Foreign State;† but a Foreign Sovereign cannot maintain a suit for innovations of his prerogative rights as reigning Sovereign.‡ "A Sovereign Prince or Ruling Chief, or Ambassador or Envoy of a Foreign State, can only be sued in the Courts of this country with the consent of the Government certified by one of its Secretaries, and only in the cases following:—(1) where such Prince, Chief, Ambassador, or Envoy, has instituted a suit in such Court against the person desiring to sue him; or (2) when the Prince, Chief, Ambassador, or Envoy, by himself or another, trades within the local limits of the jurisdiction of such Court; or (3) where the subject-matter of the suit is immoveable property situate within the said local limits, and in the possession of the Prince, Chief, Ambassador, or Envoy.§

**Government where to be sued.**—Suits against Government must be brought where the cause of action has arisen.||

**Notice.**—Two months' notice must be given before instituting suit against the Secretary of State, or against a public officer, in respect of an act purporting to be done by him in his official capacity; and the plaint must contain a statement that such notice has been given.¶

**Statutory Protection of Judicial Officers.**—By Act XVIII. of 1850, no person is liable for any act done, or ordered by him to be done, in the discharge of his judicial duty, if within his jurisdiction, even though he acted maliciously;° in such a case the question whether he acted in good faith does not arise;†† nor is a judicial officer liable for an act done without jurisdiction, if he in good faith believed himself

\* Civil Procedure Code, ss. 416—418.

† Civil Procedure Code, s. 431. *Beer Chunder Manikya v. Ishan Chunder Burdhan*, I. L. R., 10 Cal. 137; *Emperor of Brazil v. Robinson*, 6 A. and E. 801; *U. S. v. Wagner*, L. R., 2 Ch. App. 532; *U. S. v. Mokal*, L. R., 3 Ch. App. 79.

‡ *Emperor of Austria v. Day*, 30 L. J. Ch. 690; *Mostyn v. Fabrigas*, 1 Smith's L. C., 6th ed., 663.

§ Civil Procedure Code, s. 433.

|| *Subaraya Mudali v. The Government*, 1 Mad. 286; *Bundle v. Secretary of State in Council*, 1 Hyde 89; see also *Hearsay v. Secretary of State*, 6 All. 46.

¶ Civil Procedure Code, s. 424.

° *Collector of Sea Customs, Madras v. Panniar Chitambaram*, I. L. R., 1 Mad. 89; *Prahlad Maharudra v. Watt*, 10 Bom. 346.

†† *Meghraj v. Fakir Hussain*, I. L. R., 1 All. 290.



to have jurisdiction. Where the defendant acted without jurisdiction, his liability would depend, not on whether the act done was maliciously and without reasonable or probable cause, but whether it was within the protection of Act XVIII. of 1850, that is to say, whether it was done in good faith.\* Act XVIII. of 1850 is for the protection only of *judicial* officers, and of officers acting under their orders.†

**What is Good Faith.**—"Good faith" under the Act means an honest belief on inquiry and consideration.‡

**Necessary Averments.**—The plaint in a suit against a Judge, for an act done whilst acting judicially, must state not only that he had no jurisdiction, but also that he had no reasonable or probable cause for supposing that he had jurisdiction.§

**Protection of Ministerial Officers.**—Suit will lie for what is done by an officer ministerially, unless he acted under the orders of a judicial officer, in which case he is protected by Act XVIII. of 1850, or unless he is protected in special cases, as in the case of police-officers under section 43 of Act V. of 1861. And when ministerial officers are given protection under any Act, if they *bona fide*, and not absurdly, believe that they are acting according to law, they are protected, although they in fact act illegally.||

### Form No. 22.

#### AGAINST A JAILOR FOR AN ESCAPE.

Plaintiff states:—

1. That at the time of issuing the execution and the escape hereinafter mentioned, the defendant was Jailor of the Jail.

2 & 3. (Allege decree as in form No. 20, and issue of warrant as in preceding form.)

4. That thereafter the said E F was arrested, and committed to Jail, under a warrant issued by the said Court, directed and delivered to the defendant as Jailor of said Jail, whereby he was required to detain him in custody until he should be discharged according to law.

\* *Collector of Sea Customs v. Panniar*, 1 L. R., 1 Mad. 89.

† *Sinclair v. Broughton*, 1 L. R., 9 Cal. 341.

‡ *Rangunada Rau v. Nathamuni Thutha*, 6 Mad. 423; *Taraknath Mookhopadhyaya v. Collector of Hooghly*, 4 B. L. R. 37; *Vinayak Diraker v. Bai Itcha*, 3 Bom. 36; *Vithoba Malbari v. Corfield*, 3 Bom. App. 1. See also *Collector of Sea Customs v. Panniar*, 1 L. R., 1 Mad. 89.

§ *Prahlad Maharudra v. Watt*, 10 Bom. 346.

|| *Spooner v. Juddow*, 4 Moore 353.

5. That, in violation of his duty as such Jailor, defendant has since (to wit, on the       day of       18 ) permitted said E F to escape to the damage of the plaintiff Rs.

**Liability of Nazir.**—Where the judgment-debtor was already in the Civil Jail in execution of another decree, the nazir returned the warrant to the Court which issued it, before the time it had to run had expired. The Court again sent it to the nazir, and it was duly received in his office ; but before he became aware of this fact, the judgment-debtor had been released, and had left the district, and could not be found. It was held that the nazir ought not to have sent the warrant back, and that there was no necessity for a fresh order on it until the time which it had to run had expired, and that, if the nazir forgot the existence of this unexecuted warrant, and thus allowed the debtor to be released from the former process, when he ought to have been re-arrested under the plaintiff's warrant, there was actual negligence on his part, making him liable in damages to the plaintiff.\*

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\* *Kastur Chand v. Ravji Sada Shiv*, I. L. R., 4 Bom. 65.

**SECOND DIVISION.**  
**SUITS ON CONTRACT.**

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**FIRST SUB-DIVISION.**

**SUITS FOR DEBT.**

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**CHAPTER I.**

**ACCOUNTS.**

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**Form No. 23.**

**FOR MONEY DUE ON AN ACCOUNT.**

Plaintiff states :—

1. That between the            day of            18    , and the day of            18    , at            , the plaintiff supplied to the defendant various articles of drapery, and accounts and invoices of the goods so supplied, and their prices were from time to time furnished to the defendant, and payments on account were from time to time made by him.

2. That on the            day of            18    , a balance remained due to the plaintiff of Rs.            , and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. That on the            day of            18    , the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him Rs.            on account of the same. The residue of the said balance has never been paid.

**Effect of Adjusted Account.**—The adjustment of an account can operate either as a revival of an original promise, or as evidence of a new contract. If it be used as an acknowledgment, giving a fresh starting-point for computing a new period of limitation, it must be made in writing, and signed, before the expiration of the period of limitation prescribed. If it is to be used as evidence of a new

contract, furnishing a basis for a new cause of action, it must contain a promise in writing, duly signed as required by the Contract Act, 1872, section 25, clause 3—a bare statement of an account not being such a promise.\*

**Limitation.**—In a suit for the balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, three years from the *close of the year* in which the last item admitted or proved is entered in the account; such year to be computed as in the account.† The meaning of the words, “close of the year,” in the corresponding article in the Act of 1859, were thus explained by Norman, J.: “I can only conclude that the year is not necessarily to be the English year, or the Bengali, Sambat, Mahajani, or Fasli year, but may be something different. It is to be the year reckoned in the accounts. If the accounts are made to the particular date on which the books are closed, I think the parties are allowed three years from the end of such conventional year.‡

Literally construed, clause 85 would apply only to cases in which both parties have, in the course of their dealings, made *actual* demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been, that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such, that sometimes the balance may be in favour of one party, and sometimes of the other.§

### Form No. 24.

#### ON AN ACCOUNT STATED.

Plaintiff states :—

1. That on the       day of       18       , at       , (or by letters, bearing date the       day of       18       , and the       day of       18       , respectively), an account was stated between the plaintiff and defendant, and upon such statement a balance of Rs.       was found due to the plaintiff from the defendant.

2. That the defendant has not paid the same.

**Account Stated Defined.**—An account stated is an admission of a sum of money being due from the defendant to the plaintiff, and is usually made when there have been various dealings between the parties, and finally a balance is struck, and so much found due from one to the other. It amounts to a new contract between the

\* *Ramji v. Dharma*, I. L. R., 6 Bom. 683.

† Art. 85, Limitation Act, 1877.

‡ *Srinath Das v. Park Pittar*, 5 B. L. R. 550.

§ *Narraudas v. Vissandas*, I. L. R., 6 Bom. 134.

parties, in which case it furnishes a new cause of action.\* The mere rendering of an account does not make a stated one; but, if it is received, its correctness admitted, or offer made to pay it, it becomes a stated account, and when a party receives an account, and keeps it for a reasonable time, without objecting to it, he will be considered as acquiescing in it, and it will have the force of an account stated. Long acquiescence makes an account an account stated.†

**How to be Stated.**—The account must be stated to plaintiff or his agent, and is not sufficient if made to a stranger.‡

**Effect of Account Stated.**—An account stated alone does not extinguish, or supersede, or alter, the previous debts respecting which it is stated; § but it may, by agreement, effect an extinction of cross demands, and so operate as payment *pro tanto*; ¶ and in such case the discharge of the other items is a sufficient consideration to support the debt for the balance, even though the account contained claims, for which action would not lie.¶¶

**Evidence.**—The statement may be proved by writing, as by bill or note,\*\* if properly stamped,†† or an I O U,‡‡ or by oral evidence.§§

**When Suit Lies.**—The claim upon an account stated lies when there is an absolute acknowledgment made by the defendant to the plaintiff of a debt due from him to the plaintiff and payable at the time of action brought.¶¶¶

**Necessary Averments.**—When the account stated, or admission of liability, has been made in writing, it should be so stated, and when the admission relied on is not express, but is to be gathered from letters, conversation, or circumstances, the amount claimed should be alleged to be due upon an account stated, and the letters, &c., should be referred to generally.

\* *Batta Ram v. Mussamut Nano*, Punj. Rec. No. 3 of 1878; Per Lord Abinger, C.B., in *Irving v. Veitch*, 3 M. and W. 90, 106.

† 1 Story Eq. Jur., s. 526.

‡ *Breckon v. Smith*, 1 A. and E. 488; *Tuck v. Burrow*, 7 B. and C. 623.

§ *Fidgett v. Penny*, 1 C. M. and E. 108; *Smith v. Page*, 15 M. and W. 683; *Perry v. Allwood*, 6 E. and B. 691; 25 L. J. Q. B. 408.

¶ *Ashby v. James*, 11 M. and W. 542; *Callander v. Howard*, 10 C. B. 290.

¶¶ *Laycock v. Pickles*, 4 B. and S. 497; 33 L. J. Q. B. 43.

\*\* *Wheatly v. Williams*, 1 M. and W. 533.

†† *Green v. Davies*, 4 B. and C. 235; *Jones v. Ryder*, 4 M. and W. 32.

‡‡ *Jacobs v. Fisher*, 1 O. B. 178; *Wilson v. Wilson*, 14 C. B. 616; *Curtis v. Rickards*, 1 M. and C. 46.

§§ *Kamilikare v. Somasamudderam*, 1 Mad. Rep. 183; *Newhall v. Holt*, 6 M. and W. 662; *Singleton v. Barrott*, 2 C. and I. 368.

¶¶¶ *Wayman v. Hilliard*, 7 Bing. 101; *Knowles v. Michel*, 13 East 249; *Highmore v. Primrose*, 5 M. and S. 65; *Porter v. Cooper*, 1 C. M. and E. 387; *Wray v. Milestone*, 5 M. and W. 21, 24; *Buck v. Hurst*, L. R., 1 O. P. 297.

**When Suit will not Lie.**—When accounts between a creditor and his debtor have been stated, and the latter gives the former a bond for the balance found due by him to the creditor, the latter is precluded from subsequently suing on the account stated for the balance which had been found due.\*

**Practice.**—If the plaintiff fail to prove the alleged settlement of accounts, the Court should frame additional issues, and enter into evidence regarding the items composing the account, and decree the claim regarding such items, if they are found to be due, and not otherwise.†

**Limitation.**—In suits on an account stated, three years from the time when the accounts are stated *in writing signed* by the defendant, or his agent duly authorized in this behalf, unless by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then from that time.‡ It was held under the former Acts that no *oral* statement of accounts will give a new starting point for limitation, unless the transaction amounted to a new contract, and extinguished the old cause of action. But the Calcutta High Court have now ruled that article 64 of the Limitation Act, 1877, applies to an account orally stated. The Court said: “It was ingeniously suggested in argument, on behalf of the plaintiff, that as article 64 of the Limitation Act says nothing in the 3rd column as to accounts stated by word of mouth, that article must be considered as applicable only to accounts stated in writing; and that, as no special period of limitation is prescribed for suits upon accounts stated orally, the period of limitation for such suits would be six years. It is certainly difficult to understand what the Legislature could have intended by this omission; but we think that, giving a reasonable construction to article 64, we must consider that the 2nd column means to fix three years as the period of limitation in all suits upon accounts stated. To prescribe a limitation of three years in suits upon accounts stated in writing, and six years in suits upon accounts stated orally, would be an obvious absurdity.”§

Where the whole of an account stated was written by a debtor himself with the introduction of his name at the top of the entry, it was held to be sufficiently signed within the meaning of section 19, Act XV. of 1877.¶

\* *Sirdar Kuar v. Chandravati*, I. L. R., 4 All. 331.

† *Kishen Pershad v. Bhawanees Deem*, 1 Agre Rep. F. B. 47.

‡ Art. 64, Limitation Act, 1877.

§ *Sheikh Akbar v. Sheikh Khan*, I. L. R., 7 Cal. 256; 8 C. L. R. 583.

¶ *Jekesan Bapuji v. Bhowas Bhraga*, I. L. R., 6 Bom. 89; *Andarji Kalyanji v. Dulabh Jeewan*, I. L. R., 5 Bom. 88.

## CHAPTER II.

## AWARDS.

## Form No. 25.

## ON AN AWARD OF AN ARBITRATOR.

Plaintiff states :—

1. That on the       day of       18       , at       , disputes and differences existed between the plaintiff and defendant concerning (a demand of the plaintiff for labour and services rendered to the defendant at his request), and thereupon on the day last aforesaid the plaintiff and defendant agreed in writing to submit the same to the award of A B as an arbitrator between them ; a copy of which said agreement and submission is hereunto annexed, marked Exhibit A, and made part of this plaint.

2. That thereafter the said A B, having taken upon himself the burthen of the said arbitrament, and heard plaintiff and defendant touching their said matters of dispute, thereafter on the       day of 18       , at       , duly made and published his award in writing of, and concerning the matters so referred, and thereby said arbitrator awarded and declared that, after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the sum of Rs.       for the services aforesaid ; a copy of which said award is hereunto attached, and made part hereof.

3. That the plaintiff duly performed all the conditions of said award on his part, and afterwards, on the       day of 18       , at       , gave notice of said award to the defendant, and demanded of him payment of the said sum of Rs.       so awarded to the plaintiff as aforesaid.

4. That defendant has not paid the same, nor any part thereof.

## Form No. 26.

## THE SAME—A SHORTER FORM.

Plaintiff states :—

1. (As in preceding form.)

2. That on the       day of       18       , the said arbitrator awarded that the defendant should pay the plaintiff Rs.       .

3. That the defendant has not paid the same.

**Award how Enforced.**—An award may be enforced either by suit for specific performance thereof, or in the manner provided by the Civil Procedure Code. One of the advantages of adopting the remedy given by the Code is that a decree passed in accordance with an award of arbitrators made without the intervention of the Court is not subject to appeal ;\* such a decree is final, even if there has been corruption and misconduct on the part of the arbitrators.† A suit may be brought to recover damages for breach of contract to refer to arbitration, but damages would be nominal, because there could be no proof of the money-loss.‡

**Form of Submission.**—A submission to arbitration may be either oral or in writing, and an award upon a parol submission is perfectly good, and may be enforced by suit ;§ the award also may be oral ; and where there has been an oral award, which the arbitrators intend subsequently to reduce to writing, the drawing up of the formal award is a purely ministerial act to give effect to the previously completed judicial act, and the omission to take the signature of the minority of the arbitrators to the document, which formed the record of the award, is not fatal to the award.§

**Specific Performance of Agreement to Refer.**—Specific performance of a contract to refer a controversy to arbitration cannot be had,|| but an agreement to refer, if in writing, may be enforced under section 523 of the Civil Procedure Code.

**Revocation.**—At Common Law as well as in Equity, a submission to arbitration might, at any time before the award was made, have been revoked at the pleasure of either party, notwithstanding it was made irrevocable by the express words of the submission ;¶ but the Privy Council have ruled that when parties have agreed to submit a matter to the arbitration of one or more arbitrators, no party to the agreement can revoke the submission to such arbitration, unless for good cause ; a mere arbitrary revocation will not be permitted.ºº It has been held not to be good ground for withdrawal from arbitration (1) that the arbitrator was entering into foreign matters, or (2) that a minor was likely to be interested who would not be bound.††

**Agreement to Refer when Bar to Suit.**—Before the Specific Relief Act it had been held that the ordinary clause for reference to arbitration contained in

\* *Vishnu Bhau v. Ravji Bhau*, 1 L. R., 3 Bom. 18, and cases there cited; *Modoo-soodhuno v. Odvoito Ghurn*, 12 W. R. 85.

† *Ramanoogra v. Mussamut Putmoola*, 7 W. R. 205.

‡ *Russell on Arbitration*, 67; *Livingstone v. Ralli*, 5 E. and B. 134, 24 L. J. Q. B. 269; *Street v. Rigby*, 6 Ves. 814; but see *Thomas v. Fredericks*, 10 Q. B. 775; *Russell on Arbitration*, 63; *Bahal Singh v. Shibo Ram Singh*, W. R. 76.

§ *Dandekar v. Dandekars*, 1 L. R., 6 Bom. 663.

|| *Specific Relief Act*, 1877, s. 21.

¶ *Russell on Arbitration*, 147—156.

ºº *Pestonjee v. Maneckjee and Co.*, 12 Moore's I. A. 112.

†† *Ram Coomar v. Kala Chand*, 21 W. R. 395.



commercial contracts did not oust the jurisdiction of the Courts, or prevent an action being brought on the principal contract, unless they provided that no suit should be brought until the decision of the arbitrators was pronounced ;<sup>\*</sup> but now section 21 of the Specific Relief Act, 1877, enacts, that, if any person who has made a contract to refer a controversy to arbitration, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit ; but before that section can be relied upon, it must be shown that the plaintiff had refused to refer to arbitration, and the filing of a suit is not such a refusal.<sup>†</sup>

**Specific Performance of Award.**—In order to obtain specific performance of an award, the acts to be done under the award must, in their nature, be such as the Court would enforce if found in an ordinary agreement.<sup>‡</sup>

**Necessary Averments.**—The plaint should state (1) that certain differences were referred to an arbitrator named ; (2) that the arbitrator took upon him the burden of the arbitration ; (3) that he awarded to plaintiff the sum sought to be recovered. Neither the terms of the submission, nor the text of the award, need be set out ; as a rule, it is sufficient to state that the award was for such a sum, or directed a particular thing to be done.

**Partners.**—There is no implied authority for some of the partners to bind the others by a submission to arbitration made without their knowledge or assent ; for it forms no part of the transaction in which they are jointly engaged ; and joint contractors can only be made responsible for transactions arising in the way of their business or employment. It is not, however, necessary that the assent must be given in any particular form of words, nor is it required to be made under the hand of the co-partner ; all that is necessary is, that there should be some evidence of actual authority conferred.§

**Companies.**—Any Company registered under the Act of 1882 may, under its common seal, refer to arbitration any matter in dispute between itself and any other Company or person.||

**Limitation.**—A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced ; and as by section 30 of the Specific Relief Act awards are placed on the same footing as contracts, article 113 of Schedule II. of the Limitation Act, 1877, is applicable to such a suit.¶

\* *Coringa Oil Co. v. Koegler*, I. L. R., 1 Cal. 466.

† *Jogendronundini v. Hurry Doss*, I. L. R., 5 Cal. 498.

‡ *Specific Relief Act*, 1877, s. 30.

§ *Russell on Arbitration*, p. 27.

|| *Companies' Act*, 1882, s. 96.

¶ *Seikho Bibi v. Ram Seikh Das*, I. L. R., 5 All. 263.

Form No. 27.

ON AN AWARD OF AN UMPIRE.

Plaintiff states :—

1. (Allegation as in preceding form.)
2. That the said A and B, before they proceeded upon the said arbitration on the day of 18 , by writing under their hands, appointed one E F to be umpire in the matter so submitted ; and the said arbitrators, after hearing the plaintiff and defendant, and not being agreed concerning the matters submitted to them, the said E F afterwards undertook the said arbitration, and heard the plaintiff and defendant, and on the day of 18 , the said arbitrators made their award in writing that defendant should (pay plaintiff Rs. ).
3. That he has not paid the same.

CHAPTER III.

EXPRESS PROMISES.

Form No. 28.

ON A PROMISE TO PAY IN CONSIDERATION OF A PRECEDENT DEBT.

Plaintiff states :—

1. That on the day of 18 , at , the defendant then was indebted to the plaintiff in the sum of Rs. for (state what).
2. That, in consideration thereof, he, by an instrument in writing, dated the day aforesaid (hereunto annexed, and marked " Exhibit A ") promised to pay to the plaintiff the said sum on the day of 18 .
3. That he has not paid the same.

**Consideration.**—A promise to pay a debt barred by limitation is good, if made in writing, and signed by the promisor, or his agent specially authorized in that behalf, even if made without consideration.\* When the debt is not barred, there would, of course, be a good consideration for such a promise, whether written or verbal.†

\* Contract Act, 1872, s. 25.

† Heera Lall v. Dhanput Singh, I. L. R., 4 Cal. 500 ; 3 C. L. R. 554.

## Form No. 29.

## UPON COMPROMISE OF A SUIT.

Plaintiff states:—

1. That on the       day of       18       , a suit was pending in the Court       brought by the plaintiff to recover from the defendant the sum of Rs.       for goods sold by plaintiff to defendant.

2. That on the       day of       18       , at       , in consideration that the plaintiff would discontinue said suit, and would accept Rs.       in satisfaction of his claim, the defendant promised to pay the plaintiff the sum of Rs.       .

3. That plaintiff accordingly discontinued said suit.

4. That no part of the said sum has been paid.

**Necessary Averments.**—The plaint should show that there was a claim, though it need not show that it was a valid one. It should also aver the discontinuance of the litigation in consequence of the compromise.

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Form No. 30.

## PROMISE OF A THIRD PERSON TO PAY MONEY TO PLAINTIFF.

Plaintiff states:—

1. That on the       day of       one A B was, and ever since has been, indebted to the plaintiff in the sum of Rs.       .

2. That on that day the said A B, who was the holder of a bill of exchange (describe it), then indorsed and delivered the same to the defendant, in consideration of which the defendant then and there promised A B that he would endeavour to collect the same, and that, when collected, he would apply the proceeds in payment of said indebtedness of said A B to the plaintiff.

3. That afterwards, on the       day of       18       , the defendant collected and received the same.

4. That no part thereof has been paid to the plaintiff.

Form No. 31.

ON A PROMISE TO PAY FOR THE SURRENDER OF A LEASE.

Plaintiff states:—

1. That at the time hereinafter mentioned the plaintiff leased from the defendant a house in the town of \_\_\_\_\_ for a term commencing on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and ending on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, under which he was entitled to possession of said house.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the defendant promised the plaintiff that, in consideration that he (the plaintiff) would surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of Rs. \_\_\_\_\_.

3. That the plaintiff thereupon surrendered the unexpired term of said lease and the possession of said land to the defendant.

4. That no part of the said sum has been paid.

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Form No. 32.

FOR THE PURCHASE-MONEY OF LAND SOLD.

Plaintiff states:—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the plaintiff sold (and conveyed) to the defendant the house and lot known as \_\_\_\_\_ in the town of \_\_\_\_\_, and placed him in possession of the same.

2. That defendant promised to pay plaintiff Rs. \_\_\_\_\_ for the said (house and lot).

3. That he has not paid the same, nor any part thereof.

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Form No. 33.

FOR THE PURCHASE-MONEY OF LAND SOLD, BUT NOT CONVEYED.

Plaintiff states:—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff (describe the land), for Rs. \_\_\_\_\_.

2. That on the       day of       18       , at       , the plaintiff tendered (or was ready and willing and offered to execute) a sufficient instrument of conveyance of the said property to the defendant on payment of the said sum, and still is ready and willing to execute the same.

3. That defendant has not paid the said sum.

**Vendor's Remedy.**—In England it has been held that where there has been no conveyance, and the purchaser refuses to complete, the vendor cannot recover the unpaid purchase-money as a debt, but must sue for breach of contract.\* But the Bombay High Court have held that when the vendor has given possession to the purchaser, his remedy is to sue for the sum due.†

### Form No. 34.

#### BY A COMPANY FOR A CALL AGAINST A SHAREHOLDER.

Plaintiff states:—

1. That they are a Company incorporated under the Indian Companies' Act of 1882, and, as such, doing business in their corporate name of (insert name of Company), and having their principal office and place of business at

2. That on the       day of       18       , at       , defendant and certain other persons, being desirous of associating themselves together for the purpose (here state the purpose), in consideration thereof and of the mutual promises each to the other, and of the benefits to be derived from being members of said association, made and subscribed a certain agreement in writing as follows:—

(Copy memorandum of association with subscribers' names.)

3. That the said defendant did, at the time of subscribing said agreement, set opposite to his name thereto subscribed the number of       shares.

4. That, on the       day of       18       , at a regular meeting of the shareholders of the Company, a call of Ra.       per share was duly made upon the said shares in pursuance of the registered articles of association of the Company under the provisions of said Act, and at

\* See *Larid v. Prin*, 7 M. and W. 474; *Dart, V. and P.*, 5th ed., 985.

† *Timalrao Raghavendra v. The Municipal Commissioners of Hubli*, I. L. R., 3 Bom. 172.

the time defendant was a subscriber to the capital stock of said company in the amount of      shares, and was the owner of such stock.

5. That due notice of the said call was given to the defendant, and the said call became due and payable by defendant on the      day of      18      .

6. That the whole sum of Rs.      is now due to plaintiffs from defendant thereon, and no part thereof has been paid.

**Member Defined.**—Every person who has agreed with the Company to become a member of the Company (and every person who subscribes the memorandum of association shall be deemed to have so agreed), and whose name is entered on the register of members, shall be deemed to be a member of the Company.\* Where a printed copy of the memorandum of association was registered instead of the original, the defendant was held not to be a member of the Company;† and so, also, where another document differing from the memorandum of association signed by defendant was registered.‡

**Limitation.**—In a suit for a call by a Company registered under any Statute or Act, three years from the time when the call is payable.§

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Form No. 35.

BY A COMPANY AGAINST A SHAREHOLDER FOR MONEY DUE ON  
SHARES ALLOTTED.

Plaintiff states:—

1. (Aver incorporation as in No. 34.)

2. That in contemplation of the incorporation of these plaintiffs, and for the purpose of (state purpose) then contemplated, the defendant with others, on the      day of      18      at      , became a subscriber to the stock of the said Company by signing an agreement in writing, of which the following is a copy (copy memorandum of association):—

3. That, among other persons, the defendant signed and executed the said agreement, and set opposite to his name      shares of Rs.      each, into which the capital of the Company was divided.

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\* Companies' Act, 1882, s. 45.

† Guzerat S. & W. Co. v. Girdhalal, I. L. R., 5 Bom. 425.

‡ Anandji Visram v. Nariad S. & W. Co., I. L. R., 1 Bom. 321.

§ Art. 112, Limitation Act, 1877.

4. That on or about the      day of      18      , defendant subscribed to the articles of association of the Company, and set opposite his name the number of shares of stock taken by him, to wit, shares, amounting to Rs.      .

5. That on the      day of      18      , the plaintiff Company by its directors allotted to the defendant      shares so subscribed for by him, and gave the defendant notice of such allotment.

6. That by virtue of the provisions of the articles of association of the said Company which were registered under the said Act the sum of Rs.      per share upon each of the said shares so allotted became due and payable by the defendant to the plaintiff Company immediately upon the giving of the said notice.

7. That defendant is indebted to the plaintiff Company in the sum of Rs.      in respect of money so due and payable by him as aforesaid.

**Liability of Member.**—Money payable on allotment of shares is not, properly speaking, a call.\* An applicant for shares is bound to receive, and pay for, them, if an allotment is duly made, and notice of allotment is sent to him, even if the notice do not reach him.†

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### Form No. 36.

#### BY A CORPORATION TO RECOVER A SUBSCRIPTION TO THE EXPENSE OF A PUBLIC OBJECT.

1. (Aver incorporation.)

2. That the plaintiffs, in the month of      18      , were erecting a building at      for the purposes of public worship.

3. That the defendant and others requested the plaintiff to complete the same, and, for the purpose of enabling the plaintiff to do so, they subscribed and agreed to pay to the plaintiff the sum of Rs.      in consideration of the premises and of the like subscription and agreement of other persons.

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\* See *Crosskey v. Bank of Wales*, 4 Giff. 314.

† *Wall's Case*, L. J. 15 Eq. 18; *Harris's Case*, L. R. 7 Ch. App. 587; *Beck's Case*, L. R. 9 Ch. App. 392; *Household Fire Co. v. Grant*, 4 Ex. D. 216; 43 L. J. Ex. 577.

4. That upon the faith of the said subscription the plaintiffs proceeded with the erection of the building, and expended thereon large sums of money, and incurred large liabilities, and completed said building, and otherwise duly performed all the conditions on their part.

5. That defendant has not paid said subscription or any part thereof.

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## CHAPTER IV.

### GOODS SOLD AND DELIVERED.

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#### Form No. 37.

#### GOODS SOLD AND DELIVERED.

Plaintiff states:—

1. That on the       day of       18 (or between two days, naming them), at       , plaintiff sold and delivered to the defendant, at his request, certain goods, to wit (describe the goods)

2. That defendant promised to pay Rs.       for the same (or that the same were reasonably worth Rs.       ).

3. That he has not paid the same.

**Reasonable Price.**—The law implies a promise to pay so much as the goods are reasonably worth when no express agreement as to the price has been made.\*

**Necessary Averments.**—It is not necessary to state any time at which the debt was to be paid. A general promise is to be construed as a promise to pay immediately; but if a day was fixed for payment, it should be stated as furnishing a date for the commencement of interest.

**Demand.**—No demand is necessary; the buyer is bound to seek out the seller, and pay him.\*

**Limitation.**—In suits for the price of goods sold and delivered, when no fixed period of credit is agreed upon, three years from the date of the delivery of the goods.† For the price of food and drink sold by hotel-keepers or lodging-house-keepers, one year from the time when the food or drink is delivered.‡

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\* Contract Act, 1872, s. 89.

† Art. 52, Limitation Act, 1877.

‡ Art. 8.



**Delivery where to be made.**—In the absence of any special promise to the contrary, goods sold are to be delivered at the place at which they are at the time of sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced.†

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the      day of      18      , and the remaining instalments to be paid on the      day of each succeeding month until all shall be paid.

3. That the defendant has not paid the same, nor any paid thereof.

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Form No. 40.

FOR GOODS DELIVERED TO A THIRD PARTY AT DEFENDANT'S  
REQUEST AT A FIXED PRICE.

Plaintiff states:—

That on the      day of      18      , at      , he sold to the defendant (two hundred bags of rice), and, at the request of defendant, delivered the same to one A B.

2. That defendant promised to pay to the plaintiff Rs.      therefor.

3. That he has not paid the same, nor any part thereof.

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Form No. 41.

FOR GOODS SOLD, BUT NOT DELIVERED.

Plaintiff states:—

1. That on the      day of      18      , at      , he sold to the defendant (all the potatoes then growing on his farm at      ).

2. That defendant promised to pay plaintiff Rs.      for the same.

3. That he has not paid the same.

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Form No. 42.

AGAINST HUSBAND FOR NECESSARIES FURNISHED TO HIS WIFE.

Plaintiff states:—

1. That C D is the wife of the defendant A B.

2. That on the      day of      18      , at      , plaintiff furnished to the said C D, at her request, sundry articles (food or clothing &c.), to wit:—

3. That the same were necessary to her maintenance, and suitable to her station in life.

4. That the same were reasonably worth Rs.

5. That defendant has not paid the same, nor any part thereof.

**Liability of Husband upon Wife's Contracts.**—The liability of the husband for his wife's contracts rests on the principle of agency; ordinarily the wife is the agent of her husband for the purchase of necessities for the household according to the condition in which they live,\* but not where he has expressly revoked her authority to bind him, whether the parties dealing with her have notice thereof or not,† unless there have been continuous and regular dealings with those parties with the husband's knowledge,‡ and where the wife is living separate, without adequate maintenance, she has an absolute authority to bind her husband for necessities.§ In India the principle that the wife is impliedly carrying on business as the agent of the husband is excluded by the provisions of Act III. of 1874.¶

**Authority of Hindu Wife.**—A Hindu is not liable for a debt contracted by his wife, except where it has been contracted under his express authority, or under circumstances of such pressing necessity that his authority may be implied.¶

## CHAPTER V.

### FOREIGN JUDGMENTS.

#### Form No. 43.

#### COMMON FORM.

Plaintiff states :—

1. That at the times hereinafter mentioned the Court of in the Republic of France was a Court of General Jurisdiction duly created and organized by the laws of that State.

\* *Phillipson v. Hayter*, L. R., 6 O. P. 36; 40 L. J. O. P. 14; *Etherington v. Parrot*, Ld. Raym. 1006; *Montague v. Benedict*, 2 Smith's L. C. 8th ed. 463; *Seaton v. Benedict*, ib. 491; *Debenham v. Mellon*, 5 Q. B. D. 394; 6 App. Cas. 24; 49 L. J. Q. B. 497; 50 L. J. Q. B. 155; *Lane v. Ironmonger*, 13 M. & W. 368; *Reid v. Teackle*, 13 C. B. 627; *Reneaux v. Teackle*, 8 Ex. 680; *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

† *Jolly v. Rees*, 15 C. B. N. S. 628; 33 L. J. C. P. 177. *Debenham v. Mellon*, *supra*.

‡ *Debenham v. Mellon*, *supra*.

§ *Manby v. Scott*, 2 Smith's L. C. 8th ed. 445; *Debenham v. Mellon*, *supra*; *Boulton v. Prentice*, Selwyn's N. P. 12th ed. 384; *Bazeley v. Ford*, L. R., 3 Q. B. 559; *Wilson v. Ford*, L. R. 3 Ex. 63; *Biffin v. Bignell*, 31 L. J. Ex. 189.

¶ *Allumuddy v. Braham*, 1 L. R., 4 Cal. 140.

¶ *Puri v. Mahadeo Prasad*, 1 L. R., 3 All. 123.

2. That on the       day of       18       , the plaintiff commenced a suit in the said Court against the defendant by the issuance of summons (or other process, as the case may be), which summons was duly and personally served upon said defendant (or, in which suit the defendant appeared in person, or, by attorney).

3. That thereupon, on the       day of       18       , a judgment in such suit was duly given and made by said Court in favour of the plaintiff against the defendant for the sum of francs       (if the judgment provided for a special rate of interest add, which said judgment bears interest from the date thereof at       per centum per annum).

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#### Form No. 44.

#### SHORT FORM.

Plaintiff states:—

1. That on the       day of       18       , at       , in the State (or Kingdom) of       , the       Court of that State (or Kingdom), in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff Rs.       with       per centum interest from the said date.

2. That the defendant has not paid the same.

**Foreign Judgment Defined.**—A foreign judgment means the judgment of a Court situate beyond the limits of British India, and not having authority in British India, nor established by the Governor-General in Council;\* this definition includes all Courts in England (except the Privy Council) and the Colonies.

**Effect of Foreign Judgment.**—A foreign judgment establishes a debt between the parties, but does not merge or extinguish the original cause of action; consequently, the plaintiff may sue in this country upon the original cause of action, if actionable here, or upon the judgment of the foreign Court, or upon both.†

A judgment *in rem* by a Court of competent jurisdiction is conclusive upon the whole world. Such a judgment is a binding adjudication upon the *status* of the thing adjudicated upon. A judgment *in personam* by a Court of competent jurisdiction is equally conclusive as between the parties and their privies in blood, law and estate.

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\* Civil Procedure Code, s. 2.

† Walker v. Weller, 1 Doug. 1, 5; Saddler v. Robins, 1 Camp. 253; Hall v. Odber, 11 East. 118, per Tindal, C.J.; Smith v. Nicholls, 5 Bing. N. C. 208, 221; Bank of Australasia v. Harding, 9 C. B. 661.

**When Suit Lies.**—The principles on which foreign judgments are enforced in English Courts are as follow: The judgment of a Court of competent jurisdiction over the defendant imposes on him a duty or obligation to pay the sum for which the judgment is given, which the Courts of this country are bound to enforce; but anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the suit.\* It is indispensable that the foreign Court should have jurisdiction over the defendant, and it has such jurisdiction if he was, at the time the suit was commenced, a subject of the foreign country, or if he was at that time domiciled or temporarily resident therein; and in respect of an obligation contracted in a foreign country it would possibly be held that the Courts of that country have jurisdiction over a foreigner, though he may not be domiciled in, and may have left, the country before the suit was brought; and in respect of the transactions of a Joint Stock Company formed for the purpose of carrying on business in the foreign country, the Courts of that country may, under certain circumstances, have jurisdiction over a member of the Company, though he may never have resided therein, nor owe allegiance thereto. But there is no principle holding that the mere possession of property in the foreign country would, by reason of the protection enjoyed, confer on the Courts of that country jurisdiction over a foreigner neither domiciled nor resident therein, in respect of matters unconnected with the property.† So, in a suit against a native of British India, not residing in the foreign country, upon a cause of action which arose in British India, there is no duty in the defendant to attend the foreign Court and defend the suit, and, consequently, an *ex-parte* judgment of such foreign Court imposes no duty on the defendant to pay the amount of decree.‡ But if the defendant appears and pleads, without objecting to the jurisdiction, he cannot afterwards object to the validity of the judgment of the Court on the ground that it had no jurisdiction over him;§ he would not be estopped, however, if he protested against the jurisdiction.||

**Necessary Averments.**—It is not necessary to allege that the foreign Court had jurisdiction, as that will be presumed until the contrary is shown ¶

**Evidence.**—A foreign judgment purporting to be certified in any manner, which is certified by any representative of Her Majesty, or of the Government of India resident in such country, to be the manner commonly in use in that country for the certification of copies of judicial records, may be presumed to be genuine and accurate.\*\*

\* *Russel v. Smith*, 9 M. & W. 810; *Williams v. Jones*, 13 M. & W. 633; 14 L. J. Ex. 145; *Schibasy v. Westenholz*, per *Blackburn*, L. R., 6 Q. B. 159.

† *Nallatambi v. Ponnusami*, I. L. R., 2 Mad. 400 at page 403.

‡ *Hinde & Co. v. Ponnath Brayan*, I. L. R., 4 Mad. 359; *Schibasy v. Westenholz*, L. R.; *supra*; see also *Rousellon v. Rousellon*, 16 Ch. Div. 351; and *Mathappi Chetti v. Chelappa Chetti*, I. L. R., 1 Mad. 196.

§ *Nallatambi v. Ponnusami*, *supra*; *Kandoth Mammi v. Neelanoharayil*, 8 Mad. H. C. Rep. 14; see also *Khandasawmi Pillai v. Moideen Saheb*, I. L. R., 2 Mad. 337.

¶ *Farry & Co. v. Pillai*, I. L. R., 2 Mad. 407.

¶ *Robertson v. Struth*, 5 Q. B. 941; *Henderson v. Henderson*, 6 Q. B. 238.

\*\* Evidence Act, s. 86.

**Jurisdiction of Small Cause Courts.**—A suit upon a foreign judgment is not cognizable by a mofussil Court of Small Causes.\*

**Limitation.**—In suits on foreign judgments as defined in the Civil Procedure Code, six years from the date of the judgment.†

**Judgments of Native Courts.**—A suit cannot be maintained in the Bombay Presidency on a judgment of a Native Court,‡ but such a suit may be brought in Madras.§

**Domestic Decrees.**—No suit will lie upon the decree of any Court in British India.|| And, by section 94 of the Presidency Small Cause Courts' Act, it is provided that no suit shall lie upon a decree of a Presidency Small Cause Court.

## CHAPTER VI.

### GUARANTEES.

#### Form No. 45.

#### ON A GUARANTEE FOR THE PRICE OF GOODS SOLD TO A THIRD PERSON.

Plaintiff states :—

1. That on the       day of       18       , at       , in consideration that the plaintiff would sell to one A B on credit such goods as the said A B should desire to buy of this plaintiff, the defendant promised to be answerable to the plaintiff (to the extent of Rs.       ) for the payment by the said A B of the price of goods so sold on credit.
2. That the plaintiff afterwards, on the faith of said guarantee, sold and delivered to said A B (describe the goods) for the sum of Rs.       , of which defendant had notice.
3. That payment of the same was thereafter demanded from said A B, but the same was not paid.

\* *Anakattil N. K. Karthavu v. Kocheri Pilo Pilo*, I. L. R., 6 Mad. 191.

† Art. 117, Limitation Act, 1877.

‡ *Himmatlal v. Shivajirao*, I. L. R., 8 Bom. 598; *Bhovanishankar v. Pursadri*, I. L. R., 6 Bom. 292.

§ *Sama Bayai v. Annamalai Chetti*, I. L. R., 7 Mad. 164; *Kaliyngan Chetti v. Chokalinga Pillai*, I. L. R., 7 Mad. 105.

|| *Bhovanishankar v. Pursadri*, *supra*; *Fakirapa v. Pandu Rangupa*, I. L. R., 6 Bom. 7; and *Mancharam v. Bakshi Sahib*, 6 Bom. H. C. Rep. 231; *Mirsa Mahomed Aga v. Widow of Balmakund*, L. R., 3 I. A. 241.

4. That notice of such demand and non-payment was given to the defendant.

5. That on the       day of       18       , at       , payment of the same was demanded by the plaintiff from the defendant.

6. That he has not paid the same.

7. That no particular time was agreed upon for the duration of the said credit, but a reasonable time (or       months, which is the customary time allowed in plaintiff's trade) for such credit elapsed before the commencement of this action.

**Guarantee Defined.**—A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default. It may be either oral or written.\*

**When Suit Lies.**—A suit may be maintained against a surety, although the principal debtor has not been sued;† nor is it necessary to make demand upon him before suing the surety.‡

**Demand.**—Unless expressly stipulated for the surety, a surety is not entitled to a demand for payment on default of the principal debtor;§ nor even to notice of default.||

**Consideration.**—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.¶

**Liability of Surety.**—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.\*\*

### Form No. 46.

#### ON A GUARANTEE OF A DEBT.

Plaintiff states:—

1. That on the       day of       18       , at       , one A B was indebted to plaintiff in the sum of Rs.       for,(state what).

\* Contract Act, 1872, s. 126.

† *Dewan of Cochin v. Kurusingal Kaku*, 4 M. H. O. Rep. 190; *Lachman Joharimal v. Bhapu Khandu*, 6 Bom. H. C. Rep. 241.

‡ *Redi v. Farr*, 6 M. and S. 121; *Walton v. Mascall*, 13 M. and W. 452.

§ *Sicklemore v. Thesleton*, 6 M. and S. 9; *Price v. Kirckham*, 34 L. J. Ex. 35.

|| *Lachman Joharimal v. Bhapu Khandu*, *supra*.

¶ Contract Act, 1872, s. 127.

\*\* Contract Act, 1872, s. 128.

2. That on the       day of       18   , at       , in consideration that the plaintiff would give time to, and would forbear to sue, the said A B until the       day of       18   , the defendant made and subscribed a memorandum in writing, of which the following is a copy (copy the guarantee), and delivered the same to the plaintiff, whereby he promised to the plaintiff to answer to him for the said debt.

3. That the plaintiff duly performed all the conditions thereof on his part.

4. That payment of the said debt was demanded from A B, but the same was not paid.

5. That notice of such demand and non-payment was given to the defendant, and payment demanded from him.

6. That defendant has not paid the same.

Consideration.—Where a claim is *bond fide* made, respecting which a doubt honestly exists, forbearing to sue is a good consideration.\*

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Form No. 47.

AGAINST SURETIES FOR PAYMENT OF RENT.

Plaintiff states:—

1. That on the       day of       18   , at       , one A B hired from the plaintiff for the term of       years the (house No.       in       Street, in the town of       ) at an annual rent of Rs.       payable monthly.

2. That (at the same time and place) the defendant agreed, in consideration of the letting of the said premises to the said A B, to guarantee the payment of the said rent.

3. That the rent aforesaid for the month ending on the       day, of       18   ; amounting to Rs.       , has not been paid.

4. That on the       day of       18   , the plaintiff gave notice to the defendant of the non-payment of said rent, and demanded payment thereof.

5. That he has not paid the same.

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\* Cook v. Wright, 1 B. and S. 559; 30 L. J. Q. B. 321; see also Llewellyn v. Llewellyn, 3 D. and L. 318.



## Form No. 48.

## ON A GUARANTEE FOR THE FIDELITY OF AN EMPLOYEE.

Plaintiff states:—

1. That on the       day of       18   , at       , the plaintiff employed one E F as a clerk.

2. That at the same time and place the defendant bound himself to the plaintiff, by a writing under his hand, in the penal sum of Rs.       , conditioned that if the said E F should faithfully perform his duties as clerk to the plaintiff, and should justly account to the plaintiff for all monies, evidences of debt, and other property, which should be at any time held in trust for the plaintiff, the same should be void, but not otherwise.

3. That between the       day of       18   , and the       day of       18   , the said E F received money and other property, amounting to the value of Rs.       for the use of the plaintiff, for which he has not accounted to him, and the same still remains due and unpaid.

## CHAPTER VII.

## INSURANCE.

## Form No. 49.

## FIRE INSURANCE—BY INSURED.

Plaintiff states:—

1. That the defendants are a Fire Insurance Company carrying on business at       .

2. That the plaintiff (was the owner or) had an interest in (a dwelling-house, known as No.       in       Street, in the town of       ), at the time of its insurance and destruction (or injury) by fire as herein-after mentioned.

3. That on the      day of      18      , at      , in consideration of the payment by the plaintiff to the defendant of the premium of Rs.      , the defendants made their policy of insurance in writing, a copy of which is annexed hereto, and made part of this plaint.

4. That on the      day of      18      , said dwelling-house was totally destroyed (or greatly damaged, and in part destroyed) by fire.

5. That plaintiff's loss thereby was Rs.      .

6. That on the      day of      18      , he furnished the defendants with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part.

7. That defendants have not paid said loss, nor any part thereof.

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Form No. 50.

THE SAME—WHERE PLAINTIFF PURCHASED THE PROPERTY  
AFTER INSURANCE.

Plaintiff states :—

1. (Allege as in last form.)

2. That (name of original insured) was the owner of (or had an interest in, &c., &c.).

3. (The same as in last form, substituting the name of the original insured instead of the plaintiff.)

4. That on the      day of      18      , at      , with the consent of the defendants in writing on said policy, the said (original insured) sold, assigned, and conveyed to the plaintiff his interest in the said (property) and in the said policy of insurance.

(Continue as in last form.)

5. That on the      day of      18      , a written notice of the date and purport of such assignment was given to the defendants at      , one of their principal places of business in India. (This paragraph should be inserted if the consent of the defendants is not required by the policy, and the words above, "with the consent," &c., should be omitted.)

## Form No. 51.

## THE SAME—LOSS PAYABLE TO MORTGAGEE.

Plaintiff states :—

1. (Allege as in form No. 49, substituting the original insured's name down to 5.)

5. That on the        day of        18   , the said insured made, executed, and delivered to plaintiff his mortgage on said premises to secure the sum of Rs.       , and assigned said policy to plaintiff as further security, and thereupon defendant, at the request of plaintiff and of the insured, endorsed on said policy, "Loss (if any) payable to (plaintiff)."

6. That said mortgage and the debt secured thereby is wholly unpaid and unsatisfied.

(Continue as in form No. 49.)

**Nature of Contract.**—A policy of fire insurance is a contract of indemnity, and upon payment of the amount of the loss the insured is entitled to be put in the place of the assured.\*

**Insurable Interests.**—A warehouseman, wharfinger, or common carrier, has a sufficient insurable interest in the goods which are deposited with him.†

**Essential Allegations.**—It is necessary to aver the loss, and that it occurred by reason of a peril insured against, but not that it did not occur by an excepted peril; that is a matter of defence which need not be anticipated. The plaint should also show that plaintiff had an insurable interest which must have existed at the time of the insuring and of the fire.‡

**Effect of Assignment of Policy.**—Every assignee by endorsement, or otherwise, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred to, and vested in, him, all rights of suit as if the contract contained in the policy had been made with himself.§

\* *Darrell v. Tibbitts*, 5 Q. B. D. 560; 50 L. J. Q. B. 33; *Midland Insurance Co. v. Smith*, 6 Q. B. D. 561; 50 L. J. Q. B. 329.

† *Waters v. Monarch Insurance Co.*, 5 E. and B. 870; 25 L. J. Q. B. 102; *London and N.-W. Ry. Co. v. Glyn*, 1 E. and E. 652; 28 L. J. Q. B. 193.

‡ *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Sadler's Co. v. Badcock*, 2 Atk. 554.

§ Act V. of 1866, s. 15.

**Limitation.**—In suits on a policy of insurance, whether life, fire, or marine, when the sum assured is payable immediately after proof of death or loss has been given to, or received by, the insurers, three years from the time when proof is given or received, whether by or from the plaintiff or any other person.\*

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**Form No. 52.**

**BY INSURED ON AGREEMENT TO INSURE—POLICY NOT DELIVERED.**

Plaintiff states:—

1. That the defendants are a Fire Insurance Company carrying on business at

2. That on or before the      day of      18      , the plaintiff applied to A B, who was then and there the duly authorized agent of the defendants for insurance against loss or damage by fire upon a certain stock of merchandise, the property of said plaintiff, consisting of (describe it), contained in a building occupied by the plaintiff for (state what) in said town of      , and the defendants by their agents then and there agreed to become an insurer to the plaintiff on the said stock for three months from that day for Rs.      at a premium of Rs.      , and that the said defendants would execute and deliver to the plaintiff a policy of insurance in the usual form of policies issued by them for the sum of Rs.      for the term of three months from the said day.

3. That the plaintiff then and there paid to the defendant said premium, to wit, Rs.      .

4. That the tenor of the policies usually issued by the defendants is as follows (here set out the legal effect of the policy).

5. That after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of three months for which the said plaintiff was so insured, to wit, on the      day of      18      the said stock of merchandise in the said building mentioned and intended to be so insured was totally destroyed by fire.

6. That plaintiff's loss thereby was Rs.      .

7. That the plaintiff duly fulfilled all the conditions of said agreement and insurance on his part, and that more than      days (or otherwise as required by defendants' policies) before the commencement of

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\* Art. 86, Limitation Act, 1877.

this suit, to wit, on the      day of      18      , at      , he gave to the defendants due notice, and proof of the loss as aforesaid, and demanded payment of the said sum of Rs.      .

8. That the defendant has not paid the same.

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**Form No. 53.**

**LIFE ASSURANCE—BY AN EXECUTOR.**

Plaintiff states :—

1. That defendants are a Life Insurance Company carrying on business at      .

2. That on the      day of      18      , at      , the defendants, in consideration of the (annual, semi-annual, or otherwise) payment by one A B to them of Rs.      , made their policy of insurance in writing, of which a copy is hereto annexed, marked Exhibit A, and thereby insured the life of said A B in the sum of Rs.      .

3. That on the      day of      18      , at      , the said A B died.

4. That the said A B left a will, by which the plaintiff was appointed the sole executor thereof.

5. That on the      day of      18      , the said will was duly proved, and probate thereof granted to the plaintiff by the Court of      .

6. That on the      day of      18      , the plaintiff furnished the defendant with proof of the death of the said A B.

7. That the said A B and the plaintiff each duly performed all the conditions of said insurance on their part.

8. That the defendant has not paid the same.

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**Form No. 54.**

**ON A LIFE POLICY—BY A WIFE PARTNER OR CREDITOR  
OF INSURED.**

Plaintiff states :—

1. (Allege as in preceding form.)

2. That on the      day of      18      , at      , the defendants, in consideration of the (annual or otherwise) payment to them of Rs.      , executed to the plaintiff a policy of insurance on the life

of (her husband) A B, of which a copy is hereto annexed, marked Exhibit A, and thereby insured the life of the said A B in the sum of Rs.

3. That the plaintiff had an interest in the life of the said A B at the time of his death, and at the time of effecting the said insurance (state nature of interest).

4. That on the       day of       18       , at       , the said A B died.

5. That on the       day of       18       , the plaintiff furnished the defendant with proof of the death of the said A B, and otherwise performed all the conditions of said policy on (her) part.

6. That defendant has not paid the said sum.

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Form No. 55.

BY ASSIGNEE IN TRUST FOR WIFE OF INSURED.

Plaintiff states:—

1. (Allege as in form No. 53.)

2. (State insurance as in form No. 53.)

3. That on the       day of       18       , the said A B assigned said policy of insurance (by endorsement thereon, or by separate instrument, as the case may be) to this plaintiff in trust for E B, his wife.

4. That on the       day of       18       , a written notice of the date and purport of such assignment was given to the defendants at       , their principal place of business for the time being (or at       , one of their principal places of business in India).

5. That on the       day of       18       , at       , said A B died.

6. That up to the time of the death of A B all premiums accrued upon said policy were fully paid.

7. That the said A B and the plaintiff each performed all the conditions of said insurance on their part, and the plaintiff more than       days before the commencement of this suit, to wit, on the       day of       , 18       , at       , gave to the defendants notice and proof of the death of said A B as aforesaid, and demanded payment of the said sum of Rs.

8. That defendants have not paid the same.

**Nature of Contract.**—A contract of life-insurance is not a contract of indemnity merely, but an undertaking by the insurers to pay a sum certain upon the death of a given life. Although it is necessary that the insurer should have an interest in the life insured at the time of making the insurance, it is not necessary that that interest should continue till the death of the person insured.\*

**Insurable Interest Defined.**—When one person derives some benefit from the fact of another person living, he is said to have an insurable interest in such other person's life. By insurable interest is meant a pecuniary interest. Therefore, a father has not an insurable interest in the life of his child;† but a husband and wife may insure each other's lives;‡ and a creditor may insure his debtor's life,§ and a beneficiary may insure the life of his trustee;|| and every person has an interest in his own life, and if he insures it, his executor is not bound to show any interest beyond this.¶ A contract of employment at a salary for a certain number of years creates an insurable interest in the life of the employer.\*\*

**Assignee—Necessary Averments.**—The assignee of a life policy need not show any interest in the life of the person insured other than the original interest of his assignor at the time of entering into the policy.††

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### Form No. 56.

#### ON AN INSURANCE AGAINST ACCIDENT.

Plaintiff states:—

1. That the defendants are an Accident Insurance Company, carrying on business at

2. That on the        day of        18       , the defendants, in consideration of the sum of Rs.        then paid to them, agreed with the plaintiff that if the plaintiff was injured by any railway accident while on a journey from        to        that day, they would pay to him the sum of Rs.        per week for every week that he was incapacitated by such accident from following his ordinary business.

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\* See *Dabry v. India, & Co., Life Insurance Company*, 15 C. B. 365; L. J., 24 C. P. 2; and 2 *Smith's Leading Cases*, 7th ed. 260.

† *Halford v. Kymer*, 10 B. & C. 724; *Worthington v. Curtis*, 1 Ch. D. 419; 45 L. J. Ch. 259.

‡ *Reed v. Key*, *Peake's Add. Cases* 70; *Hackman v. Fernie*, 3 M. & W. 505; *Reed v. Royal Ex. Assurance Company*, *Peake's Add. Cases* 70.

§ *Anderson v. Edie*, *Park Ins.*, 8th ed., 914-15.

|| *Collett v. Morrison*, 9 Hare 162.

¶ *Wainwright v. Bland*, 1 M. & Rob. 481.

\*\* *Hobden v. West*, 3 B. & S. 579; 32 L. J. Q. B. 85.

†† *Ashley v. Ashley*, 3 Sim. 149.

3. That while on the said journey the plaintiff was seriously injured by a railway accident, and he has been unable for ten weeks to follow his ordinary business, and is still unable.

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Form No. 57.

MARINE INSURANCE—ON AN OPEN POLICY.

Plaintiff states :—

1. That the defendants are a Marine Insurance Company, carrying on business at

2. That the plaintiff was the owner of (or had an interest in) the ship at the time of its insurance and loss, as hereinafter mentioned.

3. That on the day of 18, at , the defendants, in consideration of Rs. to them paid, executed to him a policy of insurance upon the said ship, whereby they promised to pay plaintiff within days after proof of loss and interest all loss and damage accruing to him by reason of the destruction or injury of the said ship during its next voyage from to , whether by perils of the sea or by fire, or by other causes therein mentioned, not exceeding Rs.

4. That the said vessel, while proceeding on the voyage mentioned in the said policy, was, on the day of 18, totally lost by the perils of the sea (or otherwise).

5. That plaintiff's loss thereby was Rs.

6. That on the day of 18, he furnished the defendants with proof of his loss and interest, and otherwise performed all the conditions of said policy on his part.

7. That defendants have not paid the said loss nor any part thereof.

**Nature of Contract.**—Marine insurance is a contract of indemnity; and hence the insurer must have what is called an insurable interest, that is to say, a *bond fide* pecuniary interest in the subject of the insurance, not only at the time of insuring, but also when the loss occurs. It follows that the insurer can recover no more than his insurable interest, that is to say, his actual loss, whatever may be the aggregate amount of the policies he holds.



**What are Insurable Interests?**—A mere equitable interest in goods is an insurable interest,\* and a lien on goods is insurable.†

**Necessary Averments.**—The plaint must state that the plaintiff had an interest at the time of making the contract, and at the happening of the loss. If the insurer sues, the plaint must aver that the interest in the subject of the policy is in the plaintiff; and if the agent sues, in the person on whose behalf he sues.‡

**Parties.**—Either the principal, or the agent, or insurance-broker, may sue; and the principal may sue in his own name, although the insurance was effected in the name of the agent, and there is nothing on the face of the policy to show the agency.§

**Definitions.**—Valued policy is where the value of the goods is stated on the face of the policy, and open policy is where the value is not so stated. A loss may be total or partial, and a total loss may be either actual or constructive. A total loss is where the subject-matter of insurance is either totally destroyed, or is so damaged as to be worthless, and the adventure is thereby totally frustrated.|| A constructive total loss is where the thing insured, though still existing in fact, is lost to all useful purposes, so far as to justify the insured in abandoning all his interest in it to the insurer, and claiming as for a total loss.¶ Where it appeared upon evidence that the goods, though much damaged, were nevertheless of such merchantable value as to make it worth while to send them on to their port of destination, no claim for a constructive total loss was maintainable.\*\* Under a policy against "total loss," a constructive total loss may be recovered,†† but notice of abandonment is a condition precedent to the right of the assured to claim for a "constructive total loss."‡‡

**Evidence of Loss.**—A ship never heard of after sailing is presumed to have foundered at sea; §§ the time within which a missing ship will be presumed lost depends on the circumstances of the case.|||| It is sufficient to prove that the ship has not been heard of in the country from which she sailed without calling witnesses from the port of destination to prove that she never arrived there.¶¶

\* *Hill v. Secretan*, 1 B. & P. 315.

† *Briggs v. Merchant Trader's Insurance Co.*, 13 Q. B. 167.

‡ *Cohen v. Hannam*, 5 Taunt 101.

§ *Provincial Insurance Co. of Canada v. Ledue*, L. R., 6 P. U. 224; *DeVignier v. Swanson*, 1 B. & P. 346n; *Brownny v. Provincial Insurance Co. of Canada*, L. R., 5 P. O. 268; *Watson v. Swan*, 11 C. B. N. S. 756; 31 L. J. C. P. 210; *Leake on Contracts*, 524.

|| *Roux v. Salvador*, 8 N. C. 266.

¶ See *Roux v. Salvador*, *supra*; *Naylor v. Taylor*, 9 B. & C. 718; *Holdworth v.*

*Wise*, 7 B. & C. 794.

\*\* *Richard Latham v. Hurruck Chand*, I. L. R., 4 Bom. 315.

†† *Adams v. M'Kenzie*, 13 C. B. N. S. 442; 32 L. J. C. P. 92.

‡‡ *Knight v. Faith*, 15 Q. B. 649; *Kaltenbach v. Mackenzie*, 3 C. P. D. 467; 48 L. J. C. P. 9.

§§ *Green v. Brown*, 2 Str. 1199.

|||| See *Houstman v. Thorton*, Holt, N. P., 243.

¶¶ *Twenlow v. Orwin*, 2 Camp. 85.

**Effect of Assignment of Policy.**—Every assignee, by endorsement or otherwise, of a policy of marine insurance, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred to, and vested in, him all rights of suit, as if the contract contained in the policy had been made with himself.\*

**Effect of Policy made after Loss.**—A policy of marine insurance on goods is not invalid by reason of its having been effected subsequently to the loss of the goods, although the policy does not contain the words "lost or not lost."†

**Native Policies.**—Policies of insurance between natives of India (those at least which do not contain the words "interest or no interest") are to be construed in the same way as such instruments have been uniformly construed by the general law merchant throughout Western Europe, viz., as contracts of indemnity.‡

**Respondentia Bonds.**—The Stamp Act, 1879, Schedule I., No. 55, defines a Respondentia Bond as any instrument securing a loan on the cargo laden, or to be laden, on board a ship, and making repayment contingent on the arrival of the cargo at the port of destination.

As to such instruments, it has been held in Bombay, where the transaction covers the out and home voyage, that, having regard to the long-established practice in that port, the interest of the lender of such a loan in the goods on board a ship on her return voyage to India is an insurable interest.§

**Effect of Repudiation of Liability.**—When insurers, on receiving notice of a claim made against them under a policy of insurance, distinctly repudiate their liability, and deny that any claim exists against them, or that the party serving such notice has any right to recover against them, there arises an immediate right to sue, and the insured is not bound to wait for the expiration of six months before taking proceedings to enforce his claim.||

### Form No. 58.

#### ON CARGO LOST BY FIRE—VALUED POLICY.

Plaintiff states :—

1. (Allege as in preceding form.)
2. That the plaintiff was the owner of (or had an interest in) two hundred barrels of flour shipped on board the vessel called the A D,

\* Act V. of 1866, s. 15.

† Jevanji Noorbhoy v. Coorji Lelladhar, I. L. B., 4 Bom. 305, and the English cases there cited.

‡ Jevanji Noorbhoy v. Coorji Lelladhar, *supra*.

§ Jevanji Noorbhoy v. Coorji Lelladhar, *supra*.

|| Richard Latham v. Hurruckchand, I. L. B., 4 Bom. 315.

from            to            at the time of the insurance and loss herein after mentioned.

3. That on the       day of       18   , at       , the defendants, in consideration of Rs.       , which the plaintiff then paid, executed to him a policy of insurance upon the said goods, whereby they promised to pay to the plaintiff Rs.       in case of the total loss by fire or other causes mentioned of the said goods before their landing at       , or, in case of partial damage, such loss as the plaintiff might sustain thereby, provided the same should exceed       per centum of the whole value of the goods.

4. That on the       day of       18   , at       , while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire.

5. That plaintiff's loss thereby was Rs.       .

6. That on the       day of       18   , he furnished the defendants with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

7. That the defendant has not paid the said loss, nor any part thereof.

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### Form No. 59.

#### ON FREIGHT—VALUED POLICY.

Plaintiff states :—

1. (Allege as in preceding forms.)

2. That he had an interest in the freight to be earned by the ship on her voyage from       to       at the time of the insurance and loss hereinafter mentioned, and that a large quantity of goods was shipped upon freight in her at that time. .

3. That on the       day of       18   , at       , the defendants, in consideration of Rs.       to them paid, executed to the plaintiff a policy of insurance upon the said freight, and thereby insured for him Rs.       upon certain goods then laden upon the said ship for a voyage from       to       against the perils of the sea and other perils therein mentioned.

4. That the said vessel, while proceeding upon the voyage mentioned in the said policy (or during said voyage, and while lying in the port of                   ), was (or state, said goods, the freight whereof was insured, were), on the       day of                   18       , totally destroyed by the perils of the sea.

(Conclude as in preceding forms.)

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Form No. 60.

AVERMENT OF LOSS BY COLLISION.

That on the       day of                   18       , while the said ship with the said goods on board was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel with great force and violence was carried against, and run foul of, the said ship, and the said ship thereby was, with the said goods, sunk and (totally) lost.

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Form No. 61.

AVERMENT OF WAIVER OF A CONDITION.

That afterwards, on the       day of                   18       , at                   , the defendants, by their agents duly authorized thereto, waived the condition of the said policy by which (designating it), and released and discharged the plaintiffs from the performance thereof (or consented that the plaintiffs should, &c., according to the facts).

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Form No. 62.

FOR A PARTIAL LOSS AND CONTRIBUTION.

Plaintiff states:—

1. (Allege as in preceding forms.)
2. That on the       day of                   18       , at                   , in consideration of the premium of Ra.       then and there paid by the plaintiff to

the defendants, the defendants made their policy of insurance in writing, and thereby insured for him Rs.                      upon certain goods then and there laden upon the said ship                      for a voyage from to                      against the perils of the sea (or mention the perils which occasioned the loss).

3. That the said ship did, on the                      day of                      18                      , sail on the said voyage, and, while proceeding thereon, was, by the perils of the sea, dismasted, and otherwise damaged in her hull, rigging, and appurtenances, insomuch that it was necessary for the preservation of said ship and her cargo to throw over a part of said cargo (or a part of her rigging and furniture), and the same was accordingly thrown over for that purpose.

4. That, in consequence thereof, plaintiff was obliged to expend Rs.                      in repairing said ship at                      , and is also liable to pay Rs.                      as a contribution to and for the loss occasioned by throwing over part of said cargo.

5. That on the                      day of                      18                      , at                      , he gave to the defendants due notice and proof of the loss as aforesaid, and otherwise duly fulfilled all the conditions of the said policy of insurance on his part.

6. That no part of the same has been paid by the defendants.

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#### Form No. 63.

#### ALLEGATION OF A PARTICULAR AVERAGE LOSS.

That on the                      day of                      18                      , while on the high seas, the sea-water broke into the said ship, and damaged part of the said (flour) to the amount of Rs.                      .

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#### Form No. 64.

#### FOR A LOSS BY GENERAL AVERAGE.

Plaintiff states :—

1. (Allege ownership or interest.)

2. (Allege insurance.)

3. That on the                      day of                      18                      , while proceeding on the voyage mentioned in the said policy, the said vessel was so endangered

by perils of the sea, that the master and crew thereof were compelled to and did cast into the sea a large part of her rigging and furniture.

4. That the plaintiff was, by reason thereof, compelled to and did pay a general average loss of Rs.

5. That on the        day of        18   , he furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That defendant has not paid the said loss.

**General Average Defined.**—General average is the damage or loss incurred by any particular part of the ship or cargo for the preservation of the rest. Such loss or damage having been incurred for the benefit of all concerned in the adventure, all persons interested in the ship, freight, and cargo, are called upon to contribute to indemnify the owner of the particular part which has sustained the damage or loss.\* In order to make such a loss the subject of a general average contribution, it must have been incurred—not suffered—intentionally; and therefore, if the damage or loss arises by the winds or waves, or from the ordinary perils in the course of the voyage, there is no general contribution for such loss or damage.†

**Adjustment, Where to be Made.**—It is the universal rule of all maritime nations that the adjustment of a general average contribution should, if possible, be made at the ship's port of discharge or delivery, as soon as possibly can be, after the ship's arrival there.‡

**Adjustment, How Made.**—An average contribution must be adjusted according to the known law and usage of the port of destination, and the assured must show that the average has been so settled and adjusted, otherwise the adjustment will not be binding on the underwriters, where it has not been made in accordance with the law in force in this country.§

The contributory value of the goods is their *nett* market price at the port of adjustment, free from all charges for freight, duties, and landing; and the value of the goods thrown overboard, ascertained in the same manner, is added to the value of the cargo saved. The value of the ship is taken as at port of delivery; and if damage has been done to the ship, which has been repaired, the established rule is to deduct one-third from the whole expense both of labour and material, and to make the contribution on the remaining two-thirds. The freight is the clear *nett* amount of the earnings of the voyage.||

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\* See Lees, S. and I., 9th ed., 347; 2 Arnould on Marine Insurance, 5th ed., 888; G. I. P. Ry. Co. v. Saunders, 80 L. J., Q. B., 218; Oppenheim v. Fry., 33 L. J., Q. B., 267; Kidstone v. Empire M. Ins. Co., L. R., 1 C. P. 535; 35 L. J., C. P., 250.

† Lees, S. and I., 9th ed., 347.

‡ Lees, S. and I., 9th ed., 353.

§ Lees, S. and I., 9th ed., 466.

|| Lees, S. and I., 9th ed., 353-54.

## CHAPTER VIII.

## MONEY RECEIVED TO PLAINTIFF'S USE.

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Form No. 65.

## COMMON FORM.

Plaintiff states :—

1. That on the      day of      18      , at      , (or at sundry times between the      day of      18      , and the      day of 18      ), the defendant received the sum of Rs.      from one A B to and for the use of the plaintiff.

2. That thereafter, on the      day of      18      , (or before commencement of this suit), the plaintiff demanded payment thereof from the defendant.

3. That defendant has not paid the same.

---

Form No. 66.

## AGAINST AGENT.

Plaintiff states :—

1. That on the      day of      18      , at      , the defendant received from the plaintiff, as agent of said plaintiff, the sum of Rs.      to the use of said plaintiff.

2. That thereafter, and before this suit, the said plaintiff demanded payment thereof from the said defendant.

3. That the defendant has not paid the same.

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Form No. 67.

## THE SAME—ANOTHER FORM.

Plaintiff states :—

1. That between the      day of      18      , and the      day of 18      , the defendant was the agent of the plaintiff in (stating generally the employment) that he collected and received as such agent from divers persons certain sums of money for, and on account of, the plaintiff, amounting in the whole to the sum of Rs.      , no part of which has been paid by defendant to the plaintiff.

2. That on the      day of      18      , at      , the plaintiff demanded payment of the same from the defendant.

3 That he has not paid the same, nor any part thereof.

**When Suit Lies.**—This suit lies whenever money has been received by the defendant, which, *ex arquo et bono*, belongs to the plaintiff, or which in equity and conscience he has no right to retain, whether there be any privity between the parties or not.

**When Liability Commences.**—A person receiving money to pay over to a third person is not liable to that person, until he has agreed to hold it to his use, or has communicated to him the fact.\*

**Necessary Averments.**—The plaint should show (1) that the money was received by the defendant, and (2) that it was received on account of the plaintiff.

**Demand.**—It is not necessary that plaintiff should make a demand before suing, where it was the duty of the defendant to have remitted the money.

**Limitation.**—In suits for money received by the defendant for the plaintiff's use, three years from the time when the money is received; † and in suits for money paid upon an existing consideration which afterwards fails, three years from the date of the failure.‡

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### Form No. 68.

#### FOR MONEY RECEIVED BY DEFENDANT THROUGH PLAINTIFF'S MISTAKE OF FACT.

Plaintiff states :—

1. That on the      day of      18      , at      , the defendant presented to the plaintiff an account of mutual dealings theretofore had between them, which said account set forth a balance due from the plaintiff to the defendant of the sum of Rs.      .

2. That the plaintiff, believing said account to be correctly stated, then paid the said sum of Rs.      to the defendant.

3. That, in fact, said account was not correctly stated, but that it overcharged the plaintiff with the sum of Rs.      by an error in adding up the items thereof (or otherwise, specifying the error). .

4. That defendant has not paid the said sum of Rs.      , though requested so to do.

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\* *Baron v. Husband*, 4 B. and Ad. 611; *Lelly v. Hays*, 5 Ad. and E. 548.

† Art. 62, Limitation Act, 1877.

‡ Art. 97, Limitation Act, 1877.



## Form No. 69.

## THE SAME—ANOTHER FORM.

Plaintiff states:—

1. That on the      day of      18      , at      , plaintiff agreed to buy, and defendant agreed to sell,      bars of silver at      annas per tola of fine silver.

2. That plaintiff procured the said bars to be assayed by one E F, who was paid by the defendant for such assay, and the said E F declared each of the said bars to contain 1,500 tolas of fine silver, and plaintiff accordingly paid the defendant Rs.      annas      therefor.

3. That each of said bars did contain only 1,200 tolas of fine silver.

4. That the defendant has not repaid the sum so overpaid.

When Suit Lies.—Money paid under a mistake of fact, which the party receiving has no claim in conscience to retain, can be recovered, though the plaintiff might have learned the real facts on inquiry;\* but money paid under a mistake of law cannot be recovered back.† When bankers cash a customer's cheque, and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it.‡

## Form No. 70.

## FOR PRICE OF GOODS SOLD BY A FACTOR.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant, in consideration of his reasonable commissions, agreed with plaintiff to sell for plaintiff certain goods, to wit (fifty barrels of flour).

2. That on the      day of      18      , at      , he delivered to the defendant (fifty barrels of flour) for sale upon commission.

\* *Milners v. Duncan*, 6 B. and C. 671; *Lucas v. Worswick*, 1 M. and Rob. 295; *Kelly v. Solari*, 9 M. and W. 54.

† *Platt v. Bromage*, 24 L. J., Ex., 63; *Barber v. Pott*, 28 L. J., Ex., 381.

‡ *Chambers v. Miller*, 32 L. J., C. P., 30; *Pollard v. Bank of England*, L. R., 6 Q. B. 623.

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3. That on the       day of       18   , (or on some other day unknown to the plaintiff before the       day of       18   ), the defendant sold the said merchandise for Rs.       .

4. That the commission and expenses of the defendant thereon amount to Rs.       .

5. That on the       day of       18   , the plaintiff demanded from the defendant the proceeds of the said merchandise.

6. That he has not paid the same.

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**Form No. 71.**

**FOR PRICE OF GOODS SOLD BY A FACTOR ON CREDIT.**

Plaintiff states :—

1. That on the       day of       18   , the plaintiff employed the defendant to sell certain goods and merchandise, to wit (fifty barrels of flour), upon commission, and delivered the same to the defendant, who then promised to sell them, and be responsible to the plaintiff for the price thereof.

2. That on the       day of       18   , as the plaintiff is informed and believes, the defendant sold said goods and merchandise for the sum of Rs.       on a credit of       months from that date, which credit expired before the commencement of this suit.

3. That the commission and expenses of the defendant thereon amount to Rs.       .

4. That the sum of Rs.       is the price of said goods and merchandise after deducting said charges.

5. That on the       day of       18   , at       , the plaintiff demanded of the defendant payment of the said sum of Rs.       .

6. That he has not paid the same.

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**Form No. 72.**

**AGAINST BROKER FOR PROCEEDS OF NOTE DISCOUNTED.**

Plaintiff states :—

1. That on the       day of       18   , at       , the plaintiff employed the defendant to negotiate a promissory note, the property of the plaintiff, made by one A B (describe the note), and thereupon he

delivered the same to the defendant, who undertook to negotiate the same for a reasonable commission, and to pay the proceeds over to the plaintiff.

2. That on the      day of      18      , the defendant procured said note to be discounted at the      Bank, and received as the proceeds thereof the sum of Rs.      .

3. That the commission and expenses of the defendant thereon amount to Rs.      .

4. That on the      day of      18      ,      at      , the plaintiff demanded of the defendant Rs.      , the balance of the proceeds of said note after deducting said expenses and commission.

5. That he has not paid the same.

## CHAPTER IX.

### MONEY LENT.

#### Form No. 73.

#### LENDER AGAINST BORROWER.

Plaintiff states :—

1. That on the      day of      18      , at      , he lent to the defendant at his request Rs.      .

2. That he has not paid the same.

**When Suit Lies.**—When no time has been fixed for the re-payment of a loan, plaintiff may sue at once, and no demand need be made.\*

**Necessary Averments.**—If interest is claimed, it is necessary to state when the loan was to be repaid in order to fix the date from which to calculate the interest.

**Limitation.**—In suits for money lent, three years from the time when the loan is made, whether the loan be repayable on demand or otherwise ;† or when the lender has given a cheque for the money, three years from the time when the cheque is paid.‡

\* *Birks v. Trippel*, 1 Wms. Saund., 1871 ed., 38 ; see also *Norton v. Ellam*, 2 M. and W. 464 ; and per Parke, B., in *Watson v. Mascoll*, 18 M. and W. 438.

† Arts. 57 and 59, Limitation Act, 1877.

‡ Art. 58, Limitation Act, 1877.

In suits for money deposited under an agreement that it shall be payable on demand, three years from the time when the demand is made.\* In a recent case, it was held that the word "deposit" in article 60 of the Limitation Act, 1877, refers to cases where money is lodged with another under an express trust, or under circumstances from which a trust can be implied.† In England it has been decided that a banker and his customer do not stand in the relation of trustee and *cestui que trust*, but only of debtor and creditor by simple contract, and an agreement to pay interest makes no difference in this respect.‡

In suits for interest, three years from the time when the interest becomes due.§

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### Form No. 74.

#### BY ASSIGNEE OF LENDER AGAINST BORROWER.

Plaintiff states :—

1. That on the      day of      18      , at      , the defendant was indebted to one A B in the sum of Rs.      on account of money lent by said A B to the defendant.

2. That on the      day of      18      , at      , the said A B assigned said indebtedness to the plaintiff, of which assignment defendant had due notice.

3. That he has not paid the same.

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## CHAPTER X.

### MONEY PAID.

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#### Form No. 75.

#### FOR MONEY PAID TO A THIRD PARTY AT DEFENDANT'S REQUEST.

Plaintiff states :—

1. That, on the      day of      18      , at      , at the request of defendant, the plaintiff paid to one A B, Rs.      .

2. That, in consideration thereof, defendant promised (or became bound) to pay the same to plaintiff on demand (or as the case may be).

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\* Art. 60, Limitation Act, 1877.

† Ram Sukh Bhunjo v. Brohmoyi Dasi, 6 C. L. R. 470.

‡ Foley v. Hill, 2 H. L. Ca. 28.

§ Art. 63, Limitation Act, 1877.

3. That, on the       day of       18       , the plaintiff demanded payment of the same from the defendant, but he has not paid the same.

**When Suit Lies.**—To maintain a suit for money paid, there must be a request or authority, which may be either express or implied ;\* a voluntary payment is not sufficient.† Where the defendant is aware that payment will be made, and does not dissent, an authority will be implied,‡ and also where the plaintiff has been legally compelled to pay, or is legally compellable.§

Where the plaintiff had paid money into Court in order to prevent the sale, in execution of a decree, of property on which he had, as mortgagee, obtained a decree and order of sale, it was held that this was not a voluntary payment, nor a payment of money equitably due ; but one made under compulsion, i.e., under pressure of the execution-proceedings, and so might be recovered in a suit for a money-decree.||

**Revenue Paid during Wrongful Possession.**—When a person takes wrongful possession of property, and pays the revenue during his possession, he cannot recover it from the true owner, and he must be content to bear the burden of his own wrong.¶

**Necessary Averments.**—If the request or authority is implied, the plaint should state facts raising the implication.

**Demand.**—Neither notice nor demand is necessary, except in so far as it affects the question of costs.

**Limitation.**—In suits for money payable for money paid for the defendant, three years from the time when the money is paid.\*\*

**Wagering Contracts.**—When a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, and the latter paid such amount, it was held that the money so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful within the meaning of section 23 of the Contract Act, 1872, and the agreement not being one by way of wager within the meaning of section 30 of that Act.††

\* *Brittain v. Lloyd*, 14 M. and W. 762 ; *Lewis v. Campbell*, 8 C. B. 541 ; *Hutchinson v. Sydney*, 10 Ex. 438.

† *Stokes v. Lewis*, 1 T. R. 20 ; *Exall v. Partridge*, per Lord Kenyon, C.J., 8 T. R. 308, 310 ; and see *Pownall v. Ferrand*, 6 B. and C. 439.

‡ *Paynter v. Williams*, 1 C. and M. 810 ; *Alexander v. Vane*, 1 M. and W. 511.

§ *Fressall v. Robinson*, per Tindall, C.J., 3 Bing. N. C. 1015 ; *Jefferys v. Gurr*, 2 B. and Ad. 833 ; *Moule v. Garrett*, per Cockburn, C.J., L. R., 7 Ex. 104 ; 41 L. J., Ex., 64 ; *Leake on Contracts*, 7.

|| *Dulichand v. Ram Kishen Singh*, I. L. R., 7 Cal. 648.

¶ *Tilnuk Chand v. Soudami Dasi*, I. L. R., 4 Cal. 566.

\*\* Art. 61, Limitation Act, 1877.

†† *Pringle v. Jafar Khan*, I. L. R., 5 All. 443.

Form No. 76.

FOR MONEY PAID ON A REVERSED DECREE.

Plaintiff states:—

1. That on or about the      day of      18      , decree was made against this plaintiff in the Court of      in a suit wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of Rs.

2. That, on the      day of      18      , at      , the plaintiff paid to the defendant the sum of Rs.      in satisfaction thereof.

3. That afterwards, on the      day of      , by the decree of the Court of      , said first-mentioned decree was reversed, but no part of the said sum of Rs.      , paid in satisfaction thereof, has been repaid to the plaintiff.

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Form No. 77.

BY BROKER FOR MONEY ADVANCED ON ACCOUNT OF HIS PRINCIPAL.

Plaintiffs state:—

1. That the plaintiffs are partners, doing business at      as brokers, under the firm name of A B & Co.

2. That as brokers, on or about the      day of      18      , they purchased for and on account of the defendant, and at his request, the following goods (designate them) under an agreement that said goods were to be paid for by the defendant at the expiration of      days from the day of purchase with the right to the defendant to pay for said goods at any time before the expiration of said      days.

3. That it is the custom of brokers in such cases to purchase the goods in their own names without disclosing the name of their principal, and in case of the failure of the principal to pay for the same to re-sell the goods on account of the principal.

4. That on the      day of      18      , at      , plaintiff offered to deliver said goods to the defendant, and demanded of him payment for the same.

5. That, on or about the      day of      18      , the defendant paid to the plaintiffs on account of said purchase of goods Rs.      .

6. That at the expiration of the said      days, the defendant failed to pay the balance due for said goods, and the plaintiffs paid for the same, and to reimburse themselves afterwards, on the      day of 18      , sold the same on his account at (state the price), and there is now due and unpaid from the defendant to the plaintiffs on account thereof the sum of Rs.      , and interest thereon from the date last aforesaid.

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**Form No. 78.**

**FOR REPAYMENT OF DEPOSIT ON PURCHASE OF LAND.**

Plaintiff states :—

1. That on the      day of      18      , at      , the plaintiff and the defendant made their contract, whereby it was mutually agreed that the said defendant should sell to the plaintiff, and the plaintiff should buy from the defendant, a certain piece of land (describe it) for the sum of Rs.      , to be paid by the plaintiff; that the defendant should make a good title to the said premises, and deliver a deed thereof on the      day of      18      , and that the plaintiff should thereupon pay to the said defendant the said purchase-money.

2. That the plaintiff, as a security for the performance of said agreement on his part, then and there deposited in the hands of said defendant the sum of Rs.      as part of said purchase-money, to be to and for the use of the defendant, and to be retained by him on account of the purchase-money if the plaintiff should complete his purchase, and receive the deed, but to be to and for the use of the plaintiff, and to be returned to him if the defendant should fail to fulfill his agreement to give a deed at the time pursuant to the agreement.

3. That he has always been ready and willing to do and perform everything in the agreement contained on his part, and on the      day of      18      , was ready and willing, and offered to the defendant to accept the deed of the premises pursuant to the agreement, and to pay to him the balance of the purchase-money due therefor.

4. That the defendant did not, on the said day of 18 , nor at any time since, give him a deed of the premises pursuant to the agreement, but refused to do so.

5. That, on the day of 18 , he demanded of the defendant payment of the sum of Rs. , deposited with him as aforesaid.

6. That he has not paid the same.

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Form No. 79.

TO RECOVER BACK A WAGER.

Plaintiff states :—

1. That, on the day of 18 , at , the defendant deposited in the hands of the plaintiff as stakeholder Rs. , which was to abide the event of a wager made between the plaintiff and one A B on the result of (here state what, as election, race, or otherwise).

2. That no decision has as yet been rendered upon said (election, race, or otherwise), and that defendant still retains said money as stakeholder.

3. That, on the day of 18 , the plaintiff demanded the return of said money of the defendant.

4. That defendant has not returned or paid back the same.

**When Suit Lies.**—A suit to recover back a wager deposited with a stakeholder is not barred by section 30 of the Contract Act, 1872 ; it may be recovered back at any time before it has been paid over to the winner, whether the event be determined or not.\*

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Form No. 80.

BY LANDLORD AGAINST TENANT FOR REPAYMENT OF TAX.

Plaintiff states :—

1. That, on the day of 18 , at , the plaintiff and the defendant entered into an agreement, of which the following is a copy (set forth agreement).

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\* See the ruling on the corresponding section in the English Statute in *Hamden v. Walsh*, 1 Q. B. D. 196.



2. That there was duly levied upon said premises for the year 18 , and while the covenants of the aforesaid agreement were in full force, and the defendant in possession of the premises by virtue thereof, a tax of Rs. , which the defendant neglected to pay.

3. That, by reason thereof, the plaintiff was, on the day of 18 , compelled to pay the said sum of Rs.

4. That defendant has not repaid the same.

---

Form No. 81.

AGAINST CARRIER TO RECOVER MONEY IN EXCESS OF FREIGHT.

Plaintiff states :—

1. That, on the day of 18 , at , the defendant agreed with the plaintiff to transport from to , and to deliver to him certain goods of the plaintiff, to wit (describe them), for the sum of Rs.

2. That the said sum of Rs. was a reasonable sum to be paid therefor.

3. That the defendant entered upon the performance of said agreement, and transported said goods.

4. That, on the arrival of said goods, the plaintiff demanded said goods of defendant, and was ready and willing, and offered to pay to the defendant for transporting the same, the said sum of Rs.

5. That the defendant refused to deliver said goods to the plaintiff unless he would pay to the defendant Rs. for transporting the same.

6. That, on the day of 18 , at , the plaintiff paid Rs. to the defendant to obtain delivery of said goods, which sum he paid under protest, and expressly denying the defendant's right to claim it, and otherwise performed all the conditions of said agreement on his part.

7. That defendant has not repaid the same, nor any part thereof.

## Form No. 82.

## TO RECOVER BACK FREIGHT ON FAILURE OF CARRIAGE.

Plaintiff states:—

1. That, on the       day of       18       , at       , the defendant agreed with the plaintiff to transport from       to       , and to deliver to him, certain goods of the plaintiff, to wit (describe them), for the sum of Rs.

2. That, on the       day of       18       , the plaintiff paid to the defendant the sum of Rs.       as an advance payment for said transportation, and otherwise performed all the conditions of said agreement on his part.

3. That the defendant has not transported said goods, nor delivered same to the plaintiff.

4. That, on the       day of       18       , at       , the plaintiff demanded of the defendant repayment of said sum of Rs.       advanced.

5. That he has not repaid the same.

## Form No. 83.

BY SURETY AGAINST PRINCIPAL FOR PAYMENT ON A SECURITY  
BOND FOR STAY OF EXECUTION PENDING APPEAL.

Plaintiff states:—

1. That, on the       day of       18       , a decree was duly given and made in the Court of       against the defendant in favour of one       for Rs.       , from which the said defendant appealed.

2. That, on the       day of       18       , at the request of the defendant, the plaintiff executed a bond, a copy of which is hereto annexed.

3. That, on the       day of       18       , the said decree was affirmed by the Court of       with Rs.       costs.

4. That, on the       day of       18       , the plaintiff paid Rs.       upon the said bond to the said       .

5. That defendant has not paid the same to plaintiff.

## CHAPTER XI.

### SERVICES, WORK, AND LABOUR.

#### Form No. 84.

#### FOR SERVICES AT A FIXED PRICE.

Plaintiff states:—

1. That between the       day of       18       , and the       day of       18       , at       , plaintiff rendered services to the defendant at his request in the capacity of (clerk or otherwise).
2. That, for said services, the defendant promised to pay plaintiff a salary at the rate of (fifty rupees per week).
3. That defendant has not paid the same (add, except Rs.       , if plaintiff has been paid in part).

#### Form No. 85.

#### THE SAME—ANOTHER FORM.

Plaintiff states:—

1. That, on the       day of       18       , at       , the defendant hired him as a clerk at a salary of Rs.       per month.
2. That from the said day, until the       day of       18       , he served the defendant as his clerk.
3. That defendant has not paid the said salary.

**Quantum Meruit.**—Where there is an express contract, it must be performed in its entirety, or nothing can be claimed under it, and there is only room for a *quantum meruit* claim where no express contract has been made.\*

**Servant's Remedy.**—Every master and employer has an undoubted right to dismiss his servant or agent at any time. After dismissal, whether wrongful or not, the servant cannot claim wages. The remedy for wrongful dismissal is by suit for damages sustained by the servant in consequence of the breach of the master's contract to employ;† but a dismissed servant is entitled to wages for any broken period during which he may have served at the rate he was earning when dismissed.‡

\* *Skinner v. Jager*, I. L. R., 6 All. 189.

† *Ranee Usnut v. Taylor*, 2 W. R. 307.

‡ *Bhugwanath Dass v. Halle*, 15 W. R. 60.

**Seamen's Wages.**—Civil Courts in this country (including Small Cause Courts) have jurisdiction to try suits by sailors against the master for wages, whatever the nationality of the vessel.\*

**Limitation.**—In suits for wages of a household servant, artisan, or labourer, one year from the time when the wages accrue due.† When a servant is appointed on a fixed monthly salary, and there is nothing to show that the salary is to be paid in advance, the limitation as to each month's salary commences from the time at which the salary became due, i.e., the end of the month, and not from the date of the dismissal.‡

In suits for seamen's wages, three years from the end of the voyage during which the wages are earned.§

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Form No. 86.

FOR SERVICES AT A REASONABLE PRICE.

Plaintiff states:—

1. That between the      day of      18      , and the      day of      18      , at      , he (made sundry repairs on several articles of furniture) for the defendant at his request, but no express agreement was made as to the sum to be paid for such services.
2. That the said services were reasonably worth Rs.      .
3. That defendant has not paid the same.

**Limitation.**—In suits for the price of work done by the plaintiff at his request, when no time has been fixed for payment, three years from the time when the work is done.¶

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Form No. 87.

BY CARRIERS FOR FREIGHT.

Plaintiff states:—

1. That, on the      day of      18      , he transported in his cart thirty tons of coal, from      to      , for the defendant, and at his request.

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\* Fritz Olnet v. Lavesso, I. L. R., 10 Cal. 878.

† Art. 7, Limitation Act, 1877.

‡ Kalichurn Mitter v. Mahomed Saleru, 6 W. R. O. Rep. 33.

§ Art. 101, Limitation Act, 1877.

¶ Art. 56, *ibid.*

2. That the defendant promised to pay plaintiff the sum of Rs. per ton as freight thereon (or that such transportation was reasonably worth Rs. ).

3. That defendant has not paid the same.

**Parties.**—In a suit for freight, the person to be sued is he in whom is the property in the goods, as it is on his account that the goods are carried ; but where there is a promise, express or implied, on the part of the consignee to pay, he may be sued, though he may not be the owner of the goods, as the delivery of the goods by the carrier is a sufficient consideration for the promise.\*

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**Form No. 88.**

**FOR PASSAGE-MONEY.**

Plaintiff states :—

1. That on the       day of       18    , he conveyed defendant in his steamer, called the       , from       to       , at his request.

2. That defendant promised to pay plaintiff Rs.       therefor (or that the said passage was reasonably worth Rs.       ).

3. That defendant has not paid the same.

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**Form No. 89.**

**BY PARENT FOR SERVICES OF MINOR SON.**

Plaintiff states :—

1. That one A B rendered services (as clerk) to the defendant at his request in his office at       , from the       day of       18    , to the       day of       18    .

2. That such services were reasonably worth Rs.       (or alleged price agreed).

3. That the said A B was then, and is now, under eighteen years of age, and the minor child of this plaintiff.

4. That the defendant has not paid the same.

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\* See *Jesson v. Solty*, 4 Taunt. 52 ; *Moller v. Young*, 4 E. & B. 755 ; 25 L. J., Q. B., 94.

## Form No. 90.

## FOR SERVICES AND MATERIALS AT A FIXED PRICE.

Plaintiff states:—

1. That, on the       day of       18 , at       , he furnished the paint, and painted defendant's house at his request.
2. That defendant promised to pay him Rs.       therefor.
3. That he has not paid the same.

## Form No. 91.

## BY AN ATTORNEY FOR SERVICES.

Plaintiff states:—

1. That between the       day of       18 , and the       day of       18 , the plaintiff performed services for the defendant, at his request, in prosecuting and defending certain suits (name them), and in drawing and engrossing various instruments in writing (describe them), and in counselling and advising the defendant regarding (mention general nature of business), and in attending in and about the business of the defendant.
2. That said services were reasonably worth Rs.
3. That defendant has not paid the same.

**When Cause of Action Arises.**—In a suit for fees, the cause of action does not arise until the pleader has completely discharged his duty on the conduct of the suit, or his client has dispensed with his services.\*

**Pleaders.**—A pleader can sue for his fees,† but not in Madras.‡ There is nothing wrong in contracting for additional remuneration if successful in gaining a suit.§

**Barristers.**—The decision in *Kennedy v. Brown*|| governs all agreements made by members of the English Bar in that character.¶

\* *Buckapatznam v. Kajamiya*, 6 Mad. H. C. R. 265.

† *Elias v. Sheogholam*, S. D. N. W. 1860, 314; *Shivram Hari v. Arjan*, I. L. R., 5 Bom. 258.

‡ *Achamparambath v. W. S. Gantz*, I. L. R., 3 Mad. 139.

§ *Khajeh Ameenodeen v. Mahomed Yaheea*, S. D. N. W. 1860, 405; *In re Attorneys' Act*, I. Ch. Div. 573.

|| 13 C. B., N. S., 677; 32 L. J., C. P., 137.

¶ *Achamparambath v. Gantz*, *supra*.

**Attorneys' Lien.**—When a firm of attorneys dissolve partnership, the dissolution acts as a discharge of the debt due to them by the client, and they cannot retain papers, but are bound to hand them over.\*

Section 171 of the Contract Act, 1872, does not give an attorney an absolute lien; the law on this subject is in this country governed by the English authorities.†

**Champerty and Maintenance.**—The English laws of maintenance and champerty are not of force as specific laws in India, either in the mofussil, or in the presidency-towns. The ground on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public policy. An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy; such cases may easily be supposed, in which it would be in furtherance of right and justice that a suitor, who had a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to meet such cases, when found to be extortionate and unconscionable so as to be inequitable, or to be entered into for improper objects, as for the purpose of gambling in litigation, or of injuring others, by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.‡

**Limitation.**—In a suit by an attorney or vakil for his costs of a suit, or a particular business, there being no express agreement as to the time when such costs are to be paid, three years from the date of the termination of the suit or business; or, where the attorney or vakil properly discontinues the suit or business, the date of such discontinuance.§

Until the costs are taxed and inserted in the decree, and the decree has issued, the suit has not terminated within the meaning of article 84 of Schedule II. of the Limitation Act, 1877.||

### Form No. 92

#### FOR SERVICES AND MATERIALS AT A REASONABLE PRICE.

Plaintiff states :—

1. That, on the       day of       18       , at       , he built a house, known as No.       , in       Street, and furnished the materials therefor for the defendant, and at his request; but no express agreement was made as to the price to be paid for such work and material.

\* *In re McCorkindale*, I. L. E., 6 Cal. 1.

† See *In re McCorkindale*, *supra*, where the law is explained; and *Bai Kisserbai v. Narranji Walji*, I. L. E., 4 Bom. 353.

‡ *Ram Coomar Coondo v. Chunder Canto Mookerjee*, I. L. E., 2 Cal. 238.

§ Art. 84, Limitation Act, 1877.

|| *Narayana Chetti v. Alfred Champion*, I. L. E., 7 Mad. 1.

2. That the said work and materials were reasonably worth Rs. .
3. That defendant has not paid the same.

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Form No. 93.

BY ADVERTISING AGENTS FOR SERVICES AND DISBURSEMENTS.

Plaintiff states :—

1. That between the      day of      18 , and the      day of      18 , at      , the plaintiff rendered services to the defendant, at his request, in causing the defendant's advertisement of his business to be inserted in the following named newspapers and periodicals (names of newspapers).
2. That plaintiff paid out, at the request of the defendant, for such insertions, for the use of the defendant, and at his request, Rs.
3. That the defendant promised to pay said amount, together with a reasonable sum, for said services.
4. That said services were reasonably worth Rs. .
5. That defendant has not paid the same.

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Form No. 94.

BY PUBLISHER AND PROPRIETOR FOR ADVERTISING.

Plaintiff states :—

1. That the plaintiffs, at the times hereinafter mentioned, were publishers and proprietors of the daily newspaper, known as the      , published at      .
2. That between the      day of      , 18 , and the      day of      18 , the plaintiff published      insertions in the said newspaper of the advertisements of the defendant at his request.
3. That such services and publications were reasonably worth Rs. .
4. That the defendant has not paid the same.

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Form. No. 95.

FOR STABLING HORSES.

Plaintiff states :—

1. That, at the request of the defendant, he provided for, kept, and fed, a horse of the defendant from the      day of      18 , to the      day of      18 .



2. That such keeping and finding of said horse was reasonably worth Rs.

3. That defendant has not paid the same.

**Agement.**—It is the duty of the agister to feed and take care of the cattle, and to allow the owner to re-take them, but he is not bound to re-deliver them to him; \* he is not liable as an insurer, but is responsible for negligence.†

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Form No. 96.

BY A BROKER FOR COMMISSION.

Plaintiff states:—

1. That he is a produce-broker, carrying on business at
2. That, on the        day of        18       , the defendant employed the plaintiff, as such broker, to sell for him, at       , two thousand bags of rice.
3. That plaintiff accordingly did sell the said two thousand bags of bags rice for Rs.
4. That no express agreement was made as to the remuneration to be paid to the plaintiff for selling said rice; but the ordinary and usual commission is 5 per cent. on the amount which the goods realize.
5. That the commission and reward due to plaintiff, as such broker, in respect of such sale, amounts to Rs.       , but the defendant has not paid the same.

**When Suit Lies.**—In the ordinary course of commercial dealings, a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent; the amount, in the absence of agreement, being governed by the usage of trade. Unless otherwise agreed, an agent is not entitled to his commission until the whole service has been completed;‡ and he is not entitled to any remuneration at all in respect of business which he has misconducted.§

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\* *Broadwater v. Blot*, Holl N. P. O. 547; *Corbett v. Packington*, 6 B. & C. 268, 271.

† *Smith v. Cook*, 1 Q. B. D. 79, 81; 45, L. J., Q. B., 122.

‡ *Contract Act*, 1872, s. 218.

§ *Ib.*, s. 220.

## CHAPTER XII. USE AND OCCUPATION.

### Form No. 97. ON AN EXPRESS CONTRACT.

Plaintiff states :—

1. That, on the       day of       18       , at       , the plaintiff rented to the defendant, and the defendant hired from the plaintiff, the house, No.       , in       Street, and agreed to pay therefor the monthly rent of Rs.       , payable monthly on the first of each month.
2. That the defendant occupied the said premises from the       day of       18       , to the       day of       18       .
3. That defendant has not paid Rs.       , being the (part of said) rent due on the       day of       18       .

**Landlords' Remedies.**—When a person who has agreed to rent premises does not enter, he cannot be sued for use and occupation,\* he must be sued for breach of contract ; but the plaintiff need not allege an actual continued occupancy.

No suit will lie to recover rent of lodgings knowingly let to a prostitute to carry on her vocation there.†

**Liability of Tenant.**—The tenant is liable to payment until he has restored full and complete possession to the landlord.

### Form No. 98. FOR RENT RESERVED IN A LEASE.

Plaintiff states :—

1. That, on the       day of       18       , at       , the defendant entered into a contract with the plaintiff under their hands, a copy of which is annexed hereto (or state the substance of the contract).
2. That the defendant has not paid the rent for the month ending on the       day of       , 18       , amounting to Rs.       .

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\* *Edge v. Stafford*, 1 O. & J. 391 ; *Lowe v. Ross*, 5 Ex. 553 ; *Towne v. D'Herrich*, 13 O. B. 892 ; 22 L. J., C. P., 219.

† *Gaurinath Mookerjee v. Madhumani*, 9 B. L. B. Ap. 37 ; 18 W. B. 445.

## Form No. 99.

## THE SAME—ANOTHER FORM.

Plaintiff states :—

1. That the plaintiff let to the defendant a house, No. ,  
in Street, , for seven years, to hold from the day  
of 18 , at Rs. a year, payable quarterly.

2. That of such rent quarters are due, and unpaid.

**Lease Defined.**—A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically, or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.\*

For the purposes of the Registration Act, lease is defined by section 3 of that Act as including a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease.

**Lease How Made.**—Where the Transfer of Property Act, 1882, applies, a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument; all other leases of immoveable property may be made either by an instrument or by oral agreement.†

**When Suit Lies.**—Rent accrued under a lease is recoverable, whether there has been an actual occupation or not.‡

**Effect of Assignment of Lease.**—The mere reservation of rent on a lease, in the absence of a covenant for payment of it, would not render the lessee liable after assignment;§ but where there is a covenant for payment, and the lessee has assigned the lease, he is still liable for the rent, although the landlord has accepted the assignee.||

**Suit for Portion of Rent.**—Where one of several joint lessors of certain land sued the lessee for *his share* of the rent payable under the lease to all the lessors, making the other lessors defendants, it was held that the suit was not maintainable, and the making of the other lessors defendants did not cure the defect in the suit.¶

\* Transfer of Property Act, 1882, s. 105.

† *Ibid.*, s. 107.

‡ 1 Wm. Saund. 240, A. N. 1.

§ Wadham v. Marlowe, 8 East. 314.

|| 1 Wm. Saund. 240; 2 Wm. Saund. 302 n (5).

¶ Manopar Das v. Mansur Ali, I. L. R., 5 All. 41.

**Damages for Holding over.**—A landlord may claim special damages from a tenant holding over, such as damages to which he has been rendered liable to a third person to whom he has let the premises, and is unable to deliver possession in consequence of the defendant holding over.\*

**Limitation.**—In suits for arrears of rent, three years from the time when the arrears become due.†

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Form No. 100.

FOR DEFICIENCY AFTER A RE-ENTRY.

Plaintiff states:—

1. That by a contract in writing, made between the plaintiff and the defendant on the       day of       18       , at       , the defendant rented from the plaintiff, and the plaintiff demised and leased to the defendant, the premises known as No.       in       Street, at the monthly rent of Rs.       , payable monthly in advance on the day of each and every month, and defendant thereby contracted with the plaintiff as follows (copy clause giving plaintiff right of re-entry).

• 2. That the defendant, contrary to the said contract (state the breach), and the plaintiff for that cause re-entered the premises, and took possession thereof by virtue of the authority given in said contract, and as agent of the defendant and not otherwise, and that he made diligent efforts to re-let the premises for the defendant, but was unable to do so.

3. That thereby the plaintiff lost the sum of Rs.       for the rent for the months of       and       .

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Form No. 101.

AGAINST ASSIGNEE OF LESSEE.

Plaintiff states:—

1. That, by a contract in writing, a copy of which is annexed, made between the plaintiff and one A B, on the       day of       18       , at       , the plaintiff leased to the said A B, and the said A B rented from the plaintiff, a certain piece of land known as (describe it), to have

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\* *Bramley v. Chesterden*, 27 L. J., C. P., 23.

† Art. 110, Limitation Act, 1882.

and to hold to the said A B and his assigns from the      day of 18      , for the term of      , then next ensuing, for the (monthly) rent of Rs.      , payable to this plaintiff on the (state days of payment), which rent said A B did thereby for himself and his assigns contract to pay to the plaintiff accordingly.

2. That thereafter and during the said term, to wit, on the      day of 18      (naming a day before the breach), all the estate and interest of said A B in said term by an assignment then by him made became vested in the defendant, who thereupon entered into possession of the demised premises.

3. That during the time the defendant was so possessed of the premises, to wit, on the      day of 18      , the sum of Rs.      of said rent for the month ending on that day (or otherwise) became due to the plaintiff from the defendant.

4. That he has not paid the same.

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#### Form No. 102.

#### GRANTEE OF REVERSION AGAINST LESSEE.

Plaintiff states:—

1. That one A B was the owner of certain premises (describe them), and on the      day of 18      , by a lease made between him and the defendant, a copy of which is annexed, and marked Exhibit A, he leased to the defendant said premises from the      day of 18      , for the term of      then next ensuing, for the (monthly or yearly) rent of Rs.      payable to the said A B his, heirs and assigns, on the (state days of payment), which rent the defendant did thereby contract to pay to the said A B, his heirs and assigns, accordingly.

2. That thereafter, on the      day of 18      at      , the said A B sold and conveyed to this plaintiff the demised premises.

3. That notice thereof was given to the defendant.

4. That thereafter, to wit, on the      day of 18      , the sum of Rs.      of said rent for the quarter ending on that day (or otherwise) became due to the plaintiff from the defendant.

5. That he has not paid the same.

## Form No. 103.

## ALLEGATION OF ASSIGNMENT.

That on the      day of      18      , at      , the said A B assigned to the plaintiff the said lease and all his right to the rent therein secured.

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## Form No. 104.

## ALLEGATION BY HEIR OF REVERSIONER.

Plaintiff states :—

1. That the said A B was, on the      day of      18      , seized of the reversion in said demised premises. That afterwards and during said term, on the      day of      18      , the said A B died so seized ; whereupon the said reversion then descended to the plaintiff as his son and heir, and thereby plaintiff then became seized thereof in fee.

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## Form No. 105.

## ASSIGNEE OF DEVISEE AGAINST ASSIGNEE OF LESSEE.

Plaintiff states :—

1. That one A B was in his lifetime the owner of certain premises (describe them), and on the      day of      18      , he leased the same to one C D by his lease, dated that day, a copy of which is hereto annexed, and marked Exhibit A.

2. That by virtue thereof the said C D entered into possession of the demised premises.

3. That on the      day of      18      , at      , the said C D assigned all his right, title, and interest in the demised premises to the defendant, who thereupon entered upon the possession thereof.

4. That on the      day of      18      , at      , the said A B died.

5. That by his last will and testament, which was proved and admitted to probate in the Court of      on the      day of      18      , the said A B devised the reversion and rent to one E F.

6. That on the       day of       18       , at       , the said E F assigned the said reversion and rent to the plaintiff.

7. That after the said E F so assigned the said reversion and rent to the plaintiff, and while the defendant was so possessed of the premises, the sum of Rs.       accrued as rent of said premises for the (month or quarter) ending on the       day of       18       , under and according to the terms of said lease.

8. That the defendant ~~has not~~ paid the same.

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Form No. 106.

FOR USE AND OCCUPATION—IMPLIED CONTRACT.

Plaintiff states:—

1. That the defendant occupied the (stable, or dwelling-house, No.       , in       Street) by permission of the plaintiff from the day of       18       , until the       day of       18       .

2. That the use of the said premises for the said period was reasonably worth Rs.       .

3. That the defendant has not paid the same.

**Implied Contracts.**—There is an implied promise to pay a reasonable rent from the mere occupation with the consent of plaintiff; and the rent accrues due from day to day;\* the implied promise is sufficiently raised by the mere fact of plaintiff's ownership;† unless the defendant can show that the occupation was adverse to plaintiff, or under a contract with a third person, or under circumstances which rebut the presumption of a contract with the plaintiff.‡

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Form No. 107.

FOR BOARD AND LODGING.

Plaintiff states:—

1. That from the       day of       18       , until the       day of       18       , defendant occupied certain rooms in the house (No.       ,

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\* *Gibson v. Kirk*, 1 Q. B. 850; *Churchward v. Ford*, 2 H. and N. 446; 26 L. J., Ex., 354; *Sloper v. Saunders*, 26 L. J., Ex., 275.

† *Heffler v. Shoox*, 19 L. J., Q. B., 295; *Churchward v. Ford*, *supra*.

‡ *Churchward v. Ford*, *supra*; *Cox v. Knight*, 18 C. B. 645; 25 L. J., C. P., 314; *Turner v. Catheron Coal Co.*, 5 Ex. 932; *Sloper v. Saunders*, *supra*; *Levy v. Lewis*, 6 C. B., N. S., 768; 30 L. J., C. P., 141.

in street) by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance, and other necessaries.

2. That, in consideration thereof, the defendant promised to pay the sum of Rs. (or that no agreement was made as to payment for such food, attendance, and necessaries, but the same were reasonably worth Rs. ).

3. That defendant has not paid the same.

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Form No. 108.

ALLEGATION FOR LODGING.

That the defendant occupied rooms in, and part of, the house of the plaintiff at (and if furnished, add, together with furniture, linen, and other household necessaries of the plaintiff which were therein) by the plaintiff's permission as his tenant from, &c.

**Implied Warranties.**—There is an implied warranty, where a furnished house is let, that the same is reasonably fit for habitation ;\* but not in the case of a house let unfurnished.

**Limitation.**—In suits for the price of lodging, one year from the date when the price becomes payable.†

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Form No. 109.

FOR HIRE OF PERSONAL PROPERTY.

Plaintiff states :—

1. That between the day of 18 , and the day of 18 , at , the defendant hired from the plaintiff (horses, carriages, &c.), for which he promised to pay the plaintiff on account thereof the sum of Rs. , on the day of 18 .

2. That defendant has not paid the same.

**Limitation.**—In suits for the hire of animals, vehicles, boats, or household furniture, three years from the time when the hire becomes payable.‡

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\* *Smith v. Marrable*, 11 M. and W. 5 ; *Wilson v. French Hatton*, 2 Ex. D. 336 ; 46 L. J., Ex., 489 ; *Campbell v. Lord Wenlock*, 4 F. and F. 710.

† Art. 9, Limitation Act, 1877.

‡ Art. 50, Limitation Act, 1877.



**Form No. IIO.****HIRE OF FURNITURE, &C., WITH DAMAGES FOR ILL-USE.**

Plaintiff states :—

1. That on the       day of       18       , at       , plaintiff rented to the defendant, and the defendant hired from the plaintiff, household furniture, plate, pictures, and books, the property of the plaintiff, to wit (describe the articles), for the space of       then next ensuing, to be returned by him to the plaintiff at the expiration of that time in good condition, reasonable wear and tear thereof excepted.

2. That he promised to pay the plaintiff for the use thereof Rs.       (in equal quarterly instalments on       days of thereafter).

3. That no part thereof has been paid.

4. That the value of the property so hired by the defendant as above alleged was Rs.       .

5. That the defendant in violation of his said agreement to return the same in good condition neglected the same, and through his negligence, carelessness, and ill-use, the same became broken, defaced, and injured, beyond the reasonable wear thereof, and in that condition were returned to plaintiff to his damage Rs.       .

**SECOND SUB-DIVISION.****SUITS UPON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.****CHAPTER I.****BILLS OF EXCHANGE AND CHEQUES.****Form No. III.****FOREIGN BILL—PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE.**

Plaintiff states :—

1. That on the       day of       18       , the defendant, by his bill of exchange, drawn in Calcutta, and directed to E F, required the said E F to pay to the plaintiff in London       pounds sterling       days after sight.

2. That on the       day of       18       , the same was duly presented to the said E F for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance.

3. That due notice thereof was given to the defendant.

4. That he has not paid the same.

5. That the value of       pounds sterling at the time of service of notice of protest on the defendant was Rs.       . Wherefore plaintiff prays judgment against defendant for Rs.       , and Rs.       damages, and interest on said sums from the       day of       18       (date of protest), at       per centum, and costs of suit.

**Consideration.**—It is not necessary to state the consideration in the bill, as that will be presumed.\*

**Date.**—The omission to date a bill can be rectified by verbal evidence of the true date.

Every negotiable instrument bearing a date shall be presumed to have been made or drawn on such date.†

**Bill When Payable.**—When no time for payment is specified in a bill, note, or cheque, it is payable on demand.‡

**Option of Holder.**—When the drawer and drawee is the same person, or the drawee is a fictitious person, or a person not having capacity to contract, the holder of a bill may at his option treat the instrument either as a bill of exchange or as a promissory note.§

**Limitation.**—In a suit on a bill of exchange payable at a fixed time after sight or after demand, three years from the time when the time fixed expires.¶ Where it is payable at sight, or after sight, but not at a fixed time, three years from the time when the bill is presented.¶¶ Where it is payable on demand, and is not accompanied by any writing restraining the right to sue, three years from the date of the bill.\*\* In suits on bills not expressly provided for, three years from the time when the bill becomes payable.†† In a suit by the acceptor of an accommodation bill against the drawer, three years from the time when the acceptor pays the amount.‡‡

\* Neg. Inst. Act, 1881, s. 118, cl. (a); *Hatch v. Traves*, 11 A. and E. 702.

† Neg. Inst. Act, 1881, s. 118, cl. (b).

‡ Neg. Inst. Act, 1881, s. 19.

§ *Smith v. Bellamy*, 2 Stark 223; *Miller v. Thomson*, 2 M. and G. 576.

¶ Art. 72, Limitation Act, 1877.

¶¶ Art. 70, Limitation Act, 1877.

\*\* Art. 73, Limitation Act, 1877.

†† Art. 80, Limitation Act, 1877.

‡‡ Art. 79, Limitation Act, 1877.

## Form No. 112.

**FOREIGN BILL—PAYEE AGAINST ACCEPTOR.**

Plaintiff states :—

1. That on the       day of       18       , at       , one E F, by his bill of exchange, now overdue, directed to the defendant, required defendant to pay to the plaintiff Rs.       ,       days after sight.

2. That on the       day of       18       , at       , the defendant accepted the said bill.

3. That he has not paid the same.

Acceptance where to be placed.—An acceptance written on the back of a bill is sufficient.\*

## Form No. 113.

**INLAND BILL—DRAWER AGAINST ACCEPTOR FOR NON-PAYMENT.**

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff by his bill of exchange, now overdue, required the defendant to pay to him Rs.       ,       days after date (or sight) thereof.

2. That defendant accepted the said bill.

3. That he has not paid the same.

4. That by reason thereof the plaintiff incurred expenses in and about the presenting and noting of the bill and incidental to the dishonour thereof.

Inland Bill Defined.—A promissory note, bill of exchange, or cheque, drawn or made in British India, and made payable in, or drawn upon any person resident in, British India, shall be deemed to be an inland instrument.†

## Form No. 114.

**THE SAME—BILL RETURNED AND TAKEN UP.**

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff, by his bill of exchange, directed to the defendant, required the defendant to pay to one A B or order Rs.       ,       days after date thereof.

\* Young v. Glover, per Lord Campbell, 3 Jur., N. S., 637.

† Neg. Inst. Act, 1881, s. 10.

2. That on the      day of      18      , the plaintiff delivered the said bill to the said A B.

3. That the defendant accepted the said bill.

4. That at maturity the same was presented for payment, but was not paid.

5. That on the      day of      18      , the same was returned to the plaintiff for non-payment, and the plaintiff as drawer thereof was compelled to take up the same, and to pay to the holder thereof the sum of Rs.      , being the amount of said bill with damages and interest.

6. That no part of the same has been re-paid.

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Form No. 115.

INLAND BILL—PAYEE AGAINST DRAWER.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant by his bill of exchange, directed to C D, required the said C D to pay to the plaintiff Rs.      ,      days after sight.

2. That on the      day of      18      , the same was duly presented to the said C D for acceptance (or payment), but was not accepted (or paid).

3. That due notice thereof was given to the defendant.

4. That he has not paid the same.

Limitation.—In a suit by the payee against the drawer of a bill which has been dishonoured by non-acceptance, three years from the date of the refusal to accept.\*

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Form No. 116.

PAYEE AGAINST DRAWER WHO IS ALSO ACCEPTOR.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant made and accepted and delivered to the plaintiff his bill of exchange, of which the following is a copy (copy of the bill and acceptance).

2. That he has not paid the same.

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\* Art. 78, Limitation Act, 1877.

**Form No. 117.**

**INLAND BILL—PAYEE AGAINST ACCEPTOR.**

Plaintiff states :—

1. That on the       day of       18       , the defendant accepted a bill of exchange, now over-due, made (or purporting to have been made) by one C D on the       day of       18       , at       , requiring the defendant to pay to the plaintiff Rs.       , after sight thereof.

2. That he has not paid the same.

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**Form No. 118.**

**THE SAME—ANOTHER FORM.**

Plaintiff states :—

1. That on the       day of       18       , at       , one A B, by his bill of exchange, dated on that day, required the defendants to pay to the order of the plaintiff Rs.       ,       days after sight for value received.

2. That on the       day of       18       , at       , the defendant, upon sight thereof, accepted said bill.

3. That he has not paid the same.

NOTE.—If the acceptance varies as to time or place from the bill, state the same as, "defendant accepted said bill payable at       ,       days after the date of the bill, or otherwise, as the case may be.

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**Form No. 119.**

**BY ACCEPTOR WITHOUT FUNDS AGAINST DRAWER.**

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant drew his bill of exchange, and directed the same to the plaintiff at       , by which bill of exchange the said defendant requested the plaintiff to pay to the order of said defendant four months after date the sum of Rs.       for value received.

2. That the plaintiff accepted said draft, and paid the same at maturity.

3. That no funds were provided by said defendant either before or after the same was drawn as aforesaid for the payment thereof, and the plaintiff has had no funds of said defendant at any time in his hands to pay the same.

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Form No. 120.

**ALLEGATION OF PRESENTMENT AND NOTICE EXCUSED BY WAIVER.**

That the defendant at the time said bill was transferred by him waived as well the presentation of the same to said for payment as notice of the non-payment thereof.

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Form No. 121.

**ALLEGATION OF EXCUSE FOR NON-PRESENTMENT,  
DRAWEE NOT FOUND.**

That on, &c., due search and inquiry was made for said at (state the place of address), that the same might be presented for acceptance, but he could not be found, and the same was not presented.

**Presentment when Excused.**—No presentment is necessary in the following cases:—

1. If the maker, drawee, or acceptor, intentionally prevents the presentment ;
2. If, the instrument being payable at his place of business, he closes such place of business, on a business-day, during the usual business hours ;
3. If, the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours ;
4. If, the instrument not being payable at any specified place, he cannot, after due search, be found ;
5. If the party sought to be charged has engaged to pay, notwithstanding non-presentment ;
6. If the party sought to be charged, after maturity makes a payment on account, or promises to pay in whole or in part, or otherwise waives his rights ;
7. As against the drawee, if he could not suffer damage from the want of presentment.\*

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\* Neg. Inst. Act, 1881, s. 76.

Form No. 122.

BY PARTNERS (PAYEES) AGAINST PARTNERS (ACCEPTORS).

Plaintiffs state :—

1. That at the times hereinafter mentioned the said plaintiffs were partners doing business at \_\_\_\_\_ under the firm name of A B & Co., and the said defendants were partners doing business at \_\_\_\_\_ under the firm name of E F & Co.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, L M and N O, partners, doing business under the firm name of L M & Co., under their said firm name made their bill of exchange directed to the defendants under their said firm name of E F & Co., bearing date on that day in the words and figures following, to wit (copy of bill).

3. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, the said defendants under their said firm name of E F & Co., upon sight thereof, accepted said bill of exchange.

4. That they have not paid the same.

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Form No. 123.

ON A BILL PAYABLE OUT OF A PARTICULAR FUND.

Plaintiff states :—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, one A B made his bill of exchange or order in writing, dated on that day, directed to the defendant, and thereby required the defendant to pay to plaintiff out of the proceeds of (state fund as in bill) Rs. \_\_\_\_\_, after date thereof, and delivered the same to the plaintiff.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, the defendant accepted the same payable when in funds from the proceeds of (&c., as in acceptance).

3. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, the defendant had funds of the said A B, proceeds of, &c.

4. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, at \_\_\_\_\_, the plaintiff demanded payment thereof from the defendant.

5. That he has not paid the same.

**Form No. 124.**

**PAYEE AGAINST DRAWER AND ACCEPTOR..**

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant A B by his bill of exchange required the defendant C D to pay to the plaintiff Rs.       ,       days after the date thereof.
2. That the defendant C D accepted said bill.
3. That at maturity the same was presented to the defendant C D for payment, but was not paid.
4. That notice thereof was given to the defendant A B.
5. That no part of the same has been paid.

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**Form. No. 125.**

**BY PAYEE ON A BILL ACCEPTED FOR HONOUR.**

Plaintiff states :—

1. That on the       day of       18       , the defendant A B by his bill of exchange required one C D to pay to the plaintiff Rs.       ,       days after the date thereof.
2. That on the       day of       18       , the same was presented to the said C D for acceptance, but was not accepted.
3. That notice thereof was given to the defendant A B.
4. That on the       day of       18       , at       , the defendant E F (acceptor for honour) accepted said bill for the honour of said A B.
5. That at maturity the same was presented for payment to said C D, but was not paid.
6. That notice thereof was given to the defendant A B.
7. That thereupon the same was duly presented to the defendant E F (acceptor for honour) for payment, but was not paid.
8. That notice thereof was given to the defendant A B.
9. That no part of the same has been paid.



**Acceptor for Honour Defined.**—When a bill of exchange has been noted or protested for non-acceptance or for better security, and any person accepts it *supra protest* for honour of the drawer or of any one of the indorsees, such person is called an acceptor for honour.\*

**Liability of Acceptor for Honour.**—In order to make the acceptor for honour liable, the bill must have been presented to the drawee for payment at maturity, dishonoured, and noted or protested.†

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**Form. No. 126.**

**FIRST INDORSEE AGAINST ACCEPTOR.**

Plaintiff states:—

1. That on the       day of       18   , the defendant accepted a bill of exchange, now overdue, made (or purporting to have been made) by one A B on the       day of       18   , at      , requiring the defendant to pay to the order of one C D Rs.      ,       after sight thereof.

2. That the said C D indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

**Consideration.**—It is unnecessary to allege that the indorsement was for value, as the consideration will be presumed.‡

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**Form. No. 127.**

**FIRST INDORSEE AGAINST FIRST INDORSER.**

Plaintiff states:—

1. That the defendant indorsed to the plaintiff a bill of exchange, now overdue, made (or purporting to be made) by one A B on the day of       18   , at      , requiring one C D to pay to the order of the defendant Rs.      ,       days after sight (or otherwise) thereof, and accepted by the said C D on the       day of       18   , at      .

2. That on the       day of       18   , at      , the same was presented to the said C D for payment, but it was not paid.

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\* Neg. Inst. Act, 1881, ss. 7 and 108.

† Neg. Inst. Act, 1881, s. 112.

‡ Neg. Inst. Act, 1881, s. 118, cl. (a).

3. That due notice thereof was given to the defendant.

4. That he has not paid the same.

**Liability of Indorsee.**—Every indorsee is liable to every subsequent indorsee, provided he receives notice of dishonour, as upon an instrument payable on demand.\*

**Indorsement How Completed.**—An indorsement is completed by delivery, actual or constructive;† and delivery is a transfer of possession.

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Form No. 128.

FIRST INDORSEE AGAINST DRAWER AND INDORSER FOR  
NON-ACCEPTANCE.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant A B, by his bill of exchange, directed to one C D, required the said C D to pay to the order of one E F Rs.      ,      days after the date thereof (or otherwise).

2. That the said A B delivered the same to the defendant E F, who indorsed it to the defendant G H.

3. That on the      day of      18      , at      , the defendant G H indorsed the same to the plaintiff.

4. That the same was presented to C D for acceptance, but was not accepted (if a foreign bill, add “and was thereupon duly protested for non-acceptance”), of all which due notice was given to the defendants.

5. That they have not paid the same.

**Limitation.**—In a suit on a dishonoured foreign bill, where protest has been made, and notice given, three years from the time when notice is given.‡

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Form No. 129.

FIRST INDORSEE AGAINST ALL PRIOR PARTIES.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant A B, by his bill of exchange, now overdue, required the defendant C D to pay to the order of the defendant E F Rs.      ,      days after sight thereof.

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\* Neg. Inst. Act, 1881, s. 35.

† Neg. Inst. Act, 1881, s. 46.

‡ Art. 77, Limitation Act, 1877.

2. That on the      day of      18      , the said C D accepted the same.

3. That the said E F indorsed the same to the plaintiff.

4. That on the      day of      18      , the same was presented to the said C D for payment, but was not paid.

5. That due notice thereof was given to the other defendants, and each of them.

6. That they have not paid the same.

**Who are Liable to Holder.**—All prior parties are liable to the holder in due course.\*

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**Form No. 180.**

**SUBSEQUENT INDORSEE AGAINST ACCEPTOR.**

Plaintiff states :—

1. (Allege acceptance of bill as in form No. 126.)

2. That by the indorsement of the said      the same was transferred to the plaintiff.

3. That the defendant has not paid the same.      -

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**Form No. 181.**

**SUBSEQUENT INDORSEE AGAINST FIRST INDORSER—INDORSEMENT SPECIAL.**

Plaintiff states :—

1. That the defendant indorsed to one C D a bill of exchange, now overdue, made (or purporting to have been made) by one A B on the      day of      18      , at      , requiring one E F to pay to the order of the defendant Rs.      ,      days after sight thereof (or otherwise), and accepted by the said E F on the      day of      18      , at      .

2. That the same was, by the indorsement of the said C D, transferred to the plaintiff.

3. That on the      day of      18      , at      , the same was presented to the said E F for payment, but was not paid.

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\* Neg. Inst. Act, 1891, s. 36.

4. That due notice thereof was given to the defendant.
5. That he has not paid the same.

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Form No. 132.

**SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.**

Plaintiff states :—

1. That a bill of exchange, now overdue, made by one A B on the day of 18 , at , requiring one C D to pay to the order of one E F Rs. , days after sight thereof (or otherwise), accepted by said C D, and indorsed by the said E F to the defendant, was, by the indorsement of the defendant (and others), transferred to the plaintiff.

(Allege presentment, notice, and non-payment as in form No. 128.)

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Form No. 133.

**SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.**

Plaintiff states :—

1. That the defendant indorsed to him a bill of exchange, now overdue, made (or purporting to have been made) by one A B on the day of 18 , at , requiring one C D to pay to the order of one E F Rs. , after sight thereof (or otherwise) (accepted by the said C D), and indorsed by the said E F to the defendant.

(Allege presentment, notice, and non-payment as in preceding form.)

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Form No. 134.

**SUBSEQUENT INDORSEE AGAINST ALL PRIOR PARTIES.**

Plaintiff states :—

1. That on the day of 18 , at , the defendant A B, by his bill of exchange, now overdue, requested the defendant C D to pay to the order of the defendant E F Rs. , days after the date thereof.

2. That the said A B delivered the same to the said E F, who thereupon indorsed it to the defendant G H.

3. That on the      day of      18      , at      , the said G H indorsed the same to the plaintiff.

4. That on the      day of      18      , at      , the defendant C D accepted said bill.

5. That at maturity the same was presented to the defendant C D for payment, but was not paid (if a foreign bill, add "and was there-upon duly protested for non-payment"), of all which due notice was given to the defendants A B, E F, and G H.

6. That they have not paid the same.

Form No. 135.

CHEQUE—PAYEE AGAINST DRAWER.

Plaintiff states:—

1. That at the times hereinafter mentioned the defendants were partners doing business as merchants at      under the firm name of C D & Co.

2. That on the      day of      18      , at      , the defendants, under their firm name of C D & Co., made their cheque in writing, dated on that day, and directed the same to the bank of A B, requiring said bank to pay to the order of the plaintiff Rs.

3. That the said cheque was presented on the      day of      18      , at      , to the said A B for payment, but was not paid.

4. That due notice thereof was given to the defendants.

5. That they have not paid the same.

**Cheque defined.**—A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand.\*

**Suit on Lost Cheque.**—When the indorser refuses to give the indorsee a duplicate of a cheque which has been lost, the latter is entitled to sue the former for a duplicate or, in the alternative, for a refund of the money paid to the indorser on the cheque. The drawer should in such a case be made a defendant.†

\* Neg. Inst. Act, 1881, s. 6.

† Baldeo Prasad v. Grish Chandar, I. L. R., 2 All. 754.

**Form No. 136.**

**INDORSEE OR BEARER AGAINST DRAWER AND INDORSER.**

Plaintiff states :—

1. That on the       day of       18   , at       , the defendant A B made his cheque, and directed the same to the bank of C D, and thereby required said C D to pay to the defendant E F or order (or bearer) Rs.       for value received, and delivered it to the defendant E F.
2. That thereupon the said defendant E F indorsed the same to this plaintiff.
3. That said cheque was duly presented for payment, but was not paid.
4. That due notice thereof was given to the defendants.
5. That they have not paid the same.

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**Form No. 137.**

**AGAINST BANK, DRAWEE HAVING CERTIFIED.**

Plaintiff states :—

1. That on the       day of       18   , at       , one A B made his cheque directed to the defendants, and thereby required them to pay to this plaintiff or order (or bearer) Rs.       , and delivered the same to this plaintiff (or if payable to a third party state accordingly).
  2. That on the       day of       18   , at       , the defendants by their agent duly authorized thereto accepted and certified the same to be good.
  3. That thereafter the same was duly presented for payment, but the same was not paid.
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## CHAPTER II.

### BONDS.

#### Form No. 138.

#### AGAINST MAKER.

Plaintiff states:—

1. That defendant, in consideration of \_\_\_\_\_, made, executed, and delivered to the plaintiff, a certain instrument in writing, of which a copy is hereto annexed, and marked Exhibit A (or an instrument in the words and figures following, to wit).

2. That by the terms of said written instrument the defendant became indebted to the plaintiff in the sum of Rs. \_\_\_\_\_.

3. That the plaintiff has fully performed all the conditions thereof on his part.

4. That defendant has not paid the same.

**Necessary Averments.**—The plaintiff need not aver the breach; it is sufficient if he allege a debt due under the bond, and it lies upon defendant to discharge the obligation.\*

**Form of Bond.**—No precise form of words is necessary to create a bond; so long as there is a writing acknowledging a debt, or denoting an intention on the part of the person who becomes bound to pay another a specified sum of money, this is sufficient to constitute a bond.†

**When Payable.**—If no time is limited in a bond for payment, the money is payable on demand.

**Unregistered Bonds.**—An unregistered bond, which contains a personal undertaking to repay money, and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation, provided the personal obligation be distinct and severable from the obligation in respect of the property mortgaged.‡

\* *Ashbee v. Peddick*, 1 M. and W. 564.

† *Addison on Contracts*, 7th edition, 171.

‡ *Luchman Singh v. Kersi*, 1 L. R., 4 All. 3; *Sheo Dial v. Prag Dal Mir*, 1 L. R., 3 All. 229; *Kattamuri Jagappa v. Padalu Latchappa*, 1 L. R., 5 Mad. 119; *Ulfatunnissa v. Hossein Khan*, 1 L. R., 9 Cal. 520; *Lachmiput v. Mirza Khairat*, 4 B. L. R. (F. B.) 18; *Vaylala Padyachy v. Moorthy Padyachy*, 4 Mad. H. O. R. 174; *Tukaram Vithoji v. Khandaji*, 6 Bom. H. O. R., O. O., 134; *Sangappa v. Basuffa*, 7 Bom. H. C. R., A. C., 1; *Suta Kulwar v. Jugernath Pershad*, 4 Agra H. C. R. 176.

## Form No. 139.

## ON A BOND FOR THE PAYMENT OF MONEY ONLY.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant made his bond, of which the following is a copy (copy the bond), and thereby promised to pay to the plaintiff the sum of (state the actual debt) on the       day of       18       , with interest, &c.

2. That he has not paid the same.

**Interest when Recoverable.**—Upon all debts, or sums certain, payable at a certain time, or otherwise, the Court before which such debts, or sums, may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such sum or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.\*

Act XXXII. of 1839 supposes a party to have been sued for a breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time, and does not affect debts contingent in amount and time of coming due.† Where, however, a usage is established, showing that interest is paid on such contracts, interest ought to be allowed according to such custom upon the principal sum decreed;‡ and in respect to mercantile usage, there needs not either the antiquity or the notoriety of custom necessary in other cases. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.§ The Act does not apply to an agreement between the parties regulating the rate of interest.||

**Rate of Interest.**—When interest has been agreed upon between the parties, the Court shall decree at such rate; if no rate has been agreed upon, the Court shall, decree interest at such rate as it shall deem reasonable.¶

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\* Act XXXII. of 1839.

† Juggomohun v. Manickchand, 7 Moore's I. A. 263.

‡ Juggomohun v. Manickchand, *supra*.

§ Juggomohun v. Manickchand, *supra*.

|| Murtunjoy v. John Cockraue, 10 Moore's I. A. 229.

¶ Act XXVIII. of 1855, s. 2.



Whenever the Court decrees that a decree shall bear interest, the Court may order the same to be calculated at the rate allowed in the decree upon the principal sum decreed, or at such other rate as the Court shall think fit.\*

But Act XXVIII. of 1855 does not prevent a Civil Court, which administers both law and equity, from examining into the character of agreements made between persons, such as mortgagor and mortgagee, trustee and beneficiary, between whom relations exist enabling one party to take advantage of the other, and from declining to enforce such agreements where they are shown to be unfair and extortionate;† nor does it prevent the Court from setting aside an unconscionable agreement made with a necessitous man, on the ground of inequality, as being an unreasonable advantage made of his necessitous situation, and as being oppressive and unjust.‡

Where the loan is repayable at a certain time, and no rate of interest is fixed to be paid after due date, the question as to the amount of interest to be allowed after that date should be treated as one of damages;§ ordinarily the rate agreed to be paid before due date may be regarded as the rate to be allowed after such date, provided it be not excessive;|| but it is within the discretion of the Court to decide the rate of interest after due date.¶

**Compound Interest.**—A stipulation to pay compound interest is not in the nature of a penalty.\*\*

**Higher Rate for Default.**—A stipulation to pay a higher rate of interest from the date of the bond in case of default in payment on due date is in the nature of a penalty, and cannot be enforced;†† but where the stipulation is, that on failure to pay principal and interest on due date, a higher rate of interest shall *thenceforth* become payable, such a stipulation is not in the nature of a penalty, and cannot be relieved against.‡‡

It is not the high rate of interest which constitutes a penalty; but the stipulation for a higher rate if the contract be broken.§§

\* Act XXVIII. of 1855, s. 3.

† *Vinayak v. Aliya*, 4 Bom. H. C. R., A. O., 202.

‡ *Omda Khanum v. Brojendro Coomar*, 20 W. R. 317.

§ *Juala Prasad v. Khunum Singh*, I. L. R., 2 All. 617.

|| *Baldeo Panday v. Gokal Rai*, I. L. R., 1 All. 603.

¶ *Doendyall v. Choa Singh*, 25 W. R. 189; *Joyram v. Nobin Chunder*, 25 W. R. 318.

\*\* *Mathura Prasad v. Durjan Singh*, I. L. R., 2 All. 639; *Tejpal v. Kesari Singh*, I. L. R., 2 All. 621; *Land Mortgage Bank v. Baboo Soorjoo*, 25 W. R. 323; *Sorju Prasad v. Beni Madho*, I. L. R., 6 All. 61; *Bhola Nath v. Fateh Sing*, I. L. R., 6 All. 63.

†† *Mahzar Ali Khan v. Sardar Mal*, I. L. R., 2 All. 769; *Khurram Sing v. Brawani Baksh*, I. L. R., 3 All. 440; *Vythilinga Mardali v. Ravana*, I. L. R., 6 Mad. 167; *Mathura Prasad v. Luggun Koer*, I. L. R., 9 Cal. 615; *Hurreenath Dass v. Kalce Preshad*, 22 W. R. 474.

‡‡ *Mackintosh v. Crow*, I. L. R., 9 Cal. 689; *Mackintosh v. Hunt*, I. L. R., 2 Cal. 502; *Het Narain Singh v. Ram Deen Singh*, I. L. R., 9 Cal. 871; 12 C. L. R. 590.

§§ *Onda Khanum v. Brojendro Coomar*, per Markby, J., 20 W. R. 317.

**Joint and Several Promisors.**—The plaintiff may at his option hold liable any one, or all, of several promisors; but, in the case of a joint debt, if he elect to sue one, he cannot afterwards sue the other, because the obligation on a joint contract, being single and entire, is extinguished by the judgment in the suit;\* but when the obligation is joint and several, the promisee may sue the promisors separately until the debt is extinguished.†

**Effect of Release.**—A release of one joint promisor does not discharge the other joint promisor.‡

**Limitation.**—In suits on a single bond, where a day is specified for payment, three years from the day so specified;§ or where no such day is specified, three years from the date of executing the bond.||

In suits on a bond payable by instalments, three years from the expiration of the first term of payment as to the part then payable, and for the other parts, the expiration of the respective terms of payments;¶ and where the bond provides that on default of payment of one instalment, the whole shall become due, three years from the time when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made, in respect of which there is no such waiver,\*\* and limitation runs as against the whole amount of the bond from the date of the default unless the default be waived.†† Mere abstinence from suit is not sufficient to prove waiver of a right to enforce a condition whereby upon default of payment of an instalment the whole debt becomes due.‡‡

A suit to recover a specific sum of money due upon a *registered bond* or other written contract is a suit for compensation for breach of contract in writing registered within the meaning of article 116 of Schedule II. of Act XV. of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought upon a similar contract which is not registered.§§

\* Kendall v. Hamilton, 4 App. Cas. 504; H. Coomar Mullick v. Rajendrolall, I. L. R., 3 Cal. 353.

† Dhunput Singh v. Sham Soonder Mitter, I. L. R., 5 Cal. 291.

‡ Contract Act, 1872, s. 44.

§ Art. 66, Limitation Act, 1877.

|| Art. 67, Limitation Act, 1877.

¶ Art. 74, Limitation Act, 1877.

\*\* Art. 75, Limitation Act, 1877.

†† Bagho Govind v. Dipchand, I. L. R., 4 Bom. 97.

‡‡ Sethu v. Nayana, I. L. R., 7 Mad. 577.

§§ Ganesah Krishna v. Madhavrao, I. L. R., 6 Bom. 75; Khunni v. Nasiruddin, I. L. R., 4 All. 255; Gaari Shankar v. Surju, I. L. R., 3 All. 276.

**Form No. 140.**

**ON AN ANNUITY BOND.**

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant by his bond became bound to plaintiff in the sum of Rs.       to be paid by the defendant to the plaintiff subject to a condition that, if the defendant should pay to the plaintiff Rs.       half yearly, on the       day of       and the       day of       in every year during the life of the plaintiff, the said bond should be void.

2. That afterwards, on the       day of       18       , the sum of Rs.       for       of the said half-yearly payments of the said annuity became due to the plaintiff, and is still unpaid.

**CHAPTER III.**

**PROMISSORY NOTES.**

**Form No. 141.**

**BY MAKER OF ACCOMMODATION NOTE HAVING PAID IT.**

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff made his promissory note, of which the following is a copy (copy the note).

2. That the plaintiff never received any consideration therefor, but that it was an accommodation note made and given to the defendant at his request and upon his promise that he would pay it at maturity.

3. That, as the plaintiff is informed and believes, the defendant thereafter, and before its maturity, negotiated it for value.

4. That the defendant failed to pay the same at maturity, and the plaintiff paid it.

5. That defendant has not repaid the same.

**Limitation.**—In suits on a promissory note payable at a fixed time after sight, or on demand, three years from the time when the fixed time expires ;\* where the note is payable on demand, and is not accompanied by any writing restraining or postponing the right to sue, three years from the date of the note.†

\* Art. 72, Limitation Act, 1877.

† Art. 73, Limitation Act, 1877.

When the note is payable by instalments, three years from the expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.\*

Where the note provides that on default of payment of one instalment the whole shall become due, three years from the time when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made, in respect of which there is no such waiver.†

In a suit on a note not expressly provided for, three years from the time when the note becomes payable.‡

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Form No. 142.

BY JOINT MAKER OF NOTE HAVING PAID IT AGAINST THE OTHER  
FOR CONTRIBUTION.

Plaintiff states:—

1. That on the      day of      18      , at      , this plaintiff and the defendant made their joint promissory note in writing, of which the following is a copy (copy the note).
2. That at maturity of said note the plaintiff was compelled to pay, and did pay, the same.
3. That no part thereof has been repaid to him.

---

Form No. 143.

BY INDORSER OF NOTE HAVING PAID A PART.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant made his promissory note, now overdue, whereby he promised to pay, to the order of the plaintiff      days after date, the sum of Rs.      for value received.
2. That thereafter, and before maturity of said note, the plaintiff endorsed it, and negotiated it for value.
3. That at maturity it was presented for payment to the defendant (or allege excuse for non-presentment), but was not paid, whereof the plaintiff had due notice.

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\* Art. 74, Limitation Act, 1877.

† Art. 75, Limitation Act, 1877.

‡ Art. 80, Limitation Act, 1877.

4. That on the      day of      18      , at      , the plaintiff paid to one A B, the holder thereof, the sum of Rs.      , the amount due on said note.

5. That no part thereof has been repaid to the plaintiff.

---

**Form No. 144.**

**PAYEE AGAINST MAKER.**

Plaintiff states :—

1. That on the      day of      18      , at      , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff Rs.      ,      days after date.

2. That he has not paid the same (except Rs.      , paid on the day of      18      ).

---

**Form No. 145.**

**THE SAME—NOTE PAYABLE AFTER NOTICE.**

1. That on the      day of      18      , at      , the defendant, by his promissory note, promised to pay to the plaintiff Rs.      ,      months after notice.

2. That, on the      day of      18      , at      , notice was given by the plaintiff to the defendant to pay the same      months after said notice.

3. That the time for payment has elapsed, but the defendant has not paid the same.

---

**Form No. 146.**

**THE SAME—NOTE PAYABLE AT A PARTICULAR PLACE.**

1. That on the      day of      18      , at      , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff (at Messrs. A. & Co.'s, Madras) Rs.      ,      months after date.

2. That the said note was duly presented for payment (at Messrs. A. & Co.'s, Madras, aforesaid), but has not been paid.

Form No. 147.

ON SEVERAL NOTES GIVEN AS SECURITY.

Plaintiff states :—

1. That on the       day of       18       , the defendants were indebted to the plaintiffs in the sum of Rs.       .
2. That to secure the payment of that sum the defendants made their promissory notes, of which the following are copies (insert copies of notes).
3. That at the same time the defendants agreed with the plaintiffs in writing that, in case of default in the payment of any of the said notes at any time when the same should become due and payable, the whole amount of said sum of Rs.       , and interest then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.
4. That the first of said notes became due and payable on the day of       18       .
5. That defendants have not paid the same.

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Form No. 148.

ON A NOTE MADE BY PARTNERS.

Plaintiff states :—

1. That at the time of making the note hereinafter mentioned the defendants were partners, doing business at       under the firm name of A B & Co.
2. That on the       day of       18       , at       , the defendants under their said firm name made their promissory note, and thereby promised to pay the plaintiff Rs.       ,       months after said date.
3. That they have not paid the same.

---

Form No. 149.

FIRST INDORSEE AGAINST MAKER.

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant, by his promissory note, now overdue, promised to pay to the order of C D Rs.       ,       days after date.

2. That the said C D indorsed the same to the plaintiff.
3. That defendant has not paid the same.

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Form No. 150.

FIRST INDORSEE AGAINST FIRST INDORSER.

Plaintiff states:—

1. That the defendant indorsed to the plaintiff a promissory note, now overdue, made (or purporting to have been made) by one A B on the day of 18 , at , to the order of the defendant for the sum of Rs. payable days after date.
2. That on the day of 18 , the same was presented to the said A B for payment, and payment thereof demanded, but the same was not paid (or state facts excusing want of presentment).
3. That due notice thereof was given to the defendant.
4. That he has not paid the same.

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Form No. 151.

THE SAME—ANOTHER FORM.

Plaintiff states:—

1. That on the day of 18 , at , A B, by his promissory note, now overdue, promised to pay to the defendant or order Rs. months after date.
2. That the defendant indorsed the same to the plaintiff (allege presentment, notice, and non-payment, as in preceding form).

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Form No. 152.

ALLEGATION OF NOTICE TO INDORSER WAIVED.

That the defendant (indorser) thereafter waived the laches of the plaintiff in not giving him notice thereof, and promised to pay said note.

Form No. 153.

ALLEGATION OF EXCUSE FOR NON-PRESENTMENT—  
MAKER NOT FOUND.

That at the maturity of said note search and inquiry was made for the said A B at (place of date of note), that the same might be presented to him for payment, but he could not be found, and the same was not paid. (Note—State any facts relative to search and inquiry, and failure to find the party.)

Form No. 154.

THE SAME—AGAINST MAKER AND INDORSER.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant A B, by his promissory note, now overdue, promised to pay to the defendant C D Rs.      ,      months after date.
2. That the defendant C D indorsed the same to the plaintiff.
3. That on the      day of      18      , the same was presented to the defendant A B, but was not paid.
4. That due notice thereof was given to the said C D.
5. That they have not paid the same.

Form No. 155.

INDORSEE AGAINST MAKER—ON NOTE DRAWN TO MAKER'S  
OWN ORDER.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant, by his promissory note, now overdue, promised to pay to bearer (or to his own order) Rs.      ,      months after date (or on demand).
2. That the same was, by the indorsement of the defendant, transferred to the plaintiff.
3. That defendant has not paid the same.



Form No. 156.

SUBSEQUENT INDORSEE AGAINST MAKER.

Plaintiff states:—

1. (Allege making of note.)
2. That the same was, by the indorsement of the said C D, and L M, and N O (or and others), transferred to the plaintiff.
3. That at maturity the same was duly presented to the defendant for payment, but was not paid.

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Form No. 157.

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER—  
INDORSEMENT SPECIAL.

Plaintiff states:—

1. That the defendant indorsed to one A B a promissory note, now overdue, made (or purporting to have been made) by one C D on the day of 18 , at , to the order of the defendant for the sum of Rs. payable days after date.
2. That the same was, by the indorsement of the said A B (and others); transferred to the plaintiff.

(Allege presentment, notice, and non-payment.)

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Form No. 158.

SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.

Plaintiff states:—

1. That a promissory note, now overdue, made (or purporting to have been made) by one A B on the day of 18 , at , to the order of one C D for Rs. (payable days after date), and indorsed by the said C D to the defendant, was, by the indorsement of the defendant (and others), transferred to the plaintiff.

(Allege presentment, notice, and non-payment as in form No. 128.)

Form No. 159.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

Plaintiff states:—

1. That the defendant indorsed to him a promissory note, now overdue, made (or purporting to have been made) by one A B on the day of 18 , at , to the order of one C D for the sum of Rs. payable days after date, and indorsed by the said C D to the defendant.

(Continue as in last form.)

Form No. 160.

SUBSEQUENT INDORSEE AGAINST ALL PRIOR PARTIES.

Plaintiff states:—

1. That on the day of 18 , at , the defendant A B, by his promissory note, now overdue, promised to pay to the order of the defendant C D Rs. , months after date.

2. That the said C D indorsed the same to the defendant E F, who indorsed it to the plaintiff.

3. That on the day of 18 , the same was presented (or state facts excusing presentment) to the said A B for payment, but it was not paid.

4. That due notice thereof was given to the defendants C D and E F.

5. That the same has not been paid.

Form No. 161.

TRANSFER NOT BY INDORSEMENT BY ASSIGNEE OF NOTE.

Plaintiff states:—

1. That on the day of 18 , at , the defendant by his promissory note, now overdue, promised to pay to the order of one A B Rs. , days after date.

2. That said A B sold and delivered said note to the plaintiff (for a valuable consideration before it was payable).

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3. That on the       day of       18       , the same was presented to the defendant for payment, but was not paid.

4. That defendant has not paid the same.

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**Form No. 162.**

**ON A NOTE PAYABLE ON A CONTINGENCY.**

**Plaintiff states:—**

1. That on the       day of       18       , at       , the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy:—

Rs. 300.

Calcutta, January 1, 185.

For value received, I promise to pay to A B one year after date three hundred rupees in case the proceeds of the sale of the ship *Spry*, which I have this day bought of him, shall exceed the sum of Rs. 10,000.

(Sd.) C. D.

2. That on the       day of       18       , the said ship was sold, and the proceeds of such sale did exceed Rs. 10,000.

3. That defendant has not paid said note.

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**THIRD SUB-DIVISION.**

**SUITS FOR COMPENSATION FOR BREACH  
OF CONTRACT.**

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**CHAPTER I.**

**ON BONDS.**

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**Form No. 163.**

**ON A BOND ON RELEASE FROM ARREST.**

**Plaintiff states:—**

1. That he instituted a suit against one A B in the Court of       to recover Rs.       for goods sold and delivered to the said A B.

2. That on the       day of       18       , the said A B having been arrested before judgment in said suit, it was ordered by the said Court

that the said A B should give security for his appearance at any time when called upon while the said suit was pending, and until execution or satisfaction of any decree that might be passed against him.

3. That afterwards, on the      day of      18      , the defendants executed and delivered to C D, Bailiff of said Court, his bond (hereunto attached, marked "Exhibit A"), whereby they promised to produce the said A B before the Court when required until the final disposal of the said suit, and in the event of their failing to do so to pay the full amount of any decree and costs that might be passed against the said A B, and thereupon the said A B was released.

4. That on the      day of      18      , decree was passed for the plaintiff in said suit for Rs.      , and Rs.      costs against the said A B.

5. That the said A B has absconded and left the jurisdiction of the Court, and has not paid the amount of said decree.

6. That on the      day of      18      , the said C D assigned the said bond to the plaintiff.

**Practice.**—The proper mode of proceeding to put a bond to secure costs of an appeal in suit is to move upon affidavits showing a breach of the condition of the bond, for a rule *nisi* calling upon the obligor and sureties to show cause why the Court should not order that the bond be assigned to some person named in the rule.\*

**Definition.**—The definition of the word "bond" in the Stamp Act, 1869, is not exhaustive, and the word "includes" in clause 5 of section 2 has an extending force, and does not limit the meaning of the term to the substance of the definition.†

**Limitation.**—In a suit on a registered bond, the limitation is six years under article 116 of Schedule II. of Act XV. of 1877.‡

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\* *Poyner Bibee v. Nujoo Khan*, I. L. R., 5 Cal. 437.

† *Nasibun v. Fero Sunkar Ghose*, I. L. R., 8 Cal. 534.

‡ *Nobocoomar v. Sein Mellick*, I. L. R., 6 Cal. 94.

## CHAPTER II.

### BREACH OF PROMISE TO MARRY.

Form. No. 164.

#### FOR REFUSAL TO MARRY.

Plaintiff states:—

1. That plaintiff is the daughter of A B, a physician living at , and the defendant is a merchant carrying on business at .

2. That by letters, bearing date the                      day of                      18 , and the                      day of                      18 , the plaintiff and defendant agreed to marry one another on the                      day of                      18 (or within a reasonable time, or on the death of C D, defendant's father).

3. That plaintiff was ready and willing to marry the defendant on the said                      day of                      18 (or that plaintiff has been always ready and willing to marry the defendant, and a reasonable time for such marriage has elapsed, or that the death of the said C D happened on the                      day of                      18 , and plaintiff has been always ready, &c.).

4. The defendant neglected and refused to marry the plaintiff on the                      day of                      18 .

**When Right to Sue Commences.**—Where the defendant, having promised to marry plaintiff on the death of A, repudiated his promise during the lifetime of A, it was held that plaintiff might sue at once.\*

When no time is mentioned for the marriage, it is considered as a promise to marry within a reasonable time.†

**Infants.**—An infant may sue, but is not liable to be sued, for breach of promise to marry.‡

**Measure of Damages.**—The Court, in assessing damages, may take into account the position in life and means of the defendant, and also the injury to the plaintiff's feelings.§

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\* *Frost v. Knight*, L. R., 5 Ex. 322; L. R., 7 Ex. 111.

† *Short v. Stone*, 8 Q. B. 358.

‡ *Holt v. Ward*, 2 St. 937.

§ *Smith v. Woodfine*, 1 C. B. N. S. 660; *Berry v. DaCosta*, L. R., 1 C. P. 331.

## Form No. 165.

## FOR MARRIAGE WITH ANOTHER.

Plaintiff states :—

1, 2, and 3. (As in preceding form.)

4. That the defendant afterwards married another woman, to wit, one A B, contrary to his said promise to the plaintiff.

(Or that at the time of making the said promise the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice.)

**When Suit Lies.**—When the defendant has married another person before the time agreed upon with the plaintiff, the latter may sue at once ; \* and when the defendant was already married at the time of making the promise, suit is maintainable, if plaintiff was not aware of the fact. †

## CHAPTER III. ON CHARTER-PARTIES.

## Form No. 166.

## OWNER AGAINST FREIGHTER FOR NOT LOADING.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship       at       , on the       day of       18       , five hundred tons of rice, which she should carry to       , and there deliver on payment of Rs.       freight ; and that the defendant should have       days for loading,       days for discharge, and       days for demurrage, if required, at Rs.       per day.

2. That at the time fixed by the said agreement the plaintiff was ready and willing and offered to receive the said merchandise from the defendant.

\* Short v. Stone, *supra* ; Carrier v. Smith, 15 M. & W. 189.

† Wild v. Harris, 7 C. B. 999 ; Millwood v. Littlewood, 5 Ex. 775.

3. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Whereupon the plaintiff demands judgment for Rs.                      for demurrage, and Rs.                      additional for compensation.

**Definitions.**—A charter-party is a contract whereby the ship-owner, or ship-master, agrees for the use of the ship by the charterer for some specified period of time, or for a particular voyage or adventure.\*

**Lay-days** are the days which by the charter-party are allowed to the charterer to load or unload; and these are, in the absence of a contrary usage, to be taken as consecutive running days.†

**Demurrage** is the time beyond the lay-days allowed for loading or unloading, for which the charterer pays so much per day. This extra time, as well as the payment for it, are called demurrage. In reckoning demurrage a fraction of a day is reckoned as a day.‡

**Measure of Damages.**—In a suit for not loading, plaintiff is entitled to recover as damages a sum equivalent to the entire freight agreed to be paid by the defendant for the goods in question, after deducting therefrom a proportionate part of the expenses of carriage which have been saved by reason of the service not having been rendered,§ and any profit which the ship has made by being otherwise employed.|| If the freighter only partially fulfils his contract, the owner may recover for the dead-freight at his contract-price; but the owner is bound to take other freight, if offered, though at a less price, and can recover only the difference in price.

**Law Applicable.**—When a contract of affreightment does not otherwise provide, as between the parties to the contract, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.¶

**Mode of Stowage.**—When the charter-party is silent on the subject of stowage, the usage of trade will obtain, and the owner will not be liable for damages resulting therefrom.

**Injunctions.**—Where a charter-party has been actually completed, the Court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted.\*\*

\* Addison on Contracts, 7th edition, 718.

† Brown v. Johnson, 10 M. & W. 331.

‡ Commercial Steam Ship Co. v. Boulton, L. R., 10 Q. B. 346; 44 L. J., Q. B., 219.

§ DeAngelis & Co. v. Mayappa Chetty, L. R., 5 Cal. 578.

|| Smith v. Maguire, 3 H. & N. 554; 27 L. J., Ex., 465; Morris v. Levison, 1 C. P. D.

155-58; 45 L. J., C. P., 409.

¶ Lloyd v. Guibert, L. R., 1 Q. B., 115.

\*\* Haji Abdul v. Haji Abdul Bacha, L. R., 6 Bom. 5.

When a vessel is chartered to proceed to a safe port, or so near thereunto as she may safely get, and deliver the same always afloat, the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge, "always afloat," without being lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers.\*

Form No. 167.

CHARTERER AGAINST OWNER FOR DEVIATION FROM CONTRACT  
AND ABANDONMENT OF VOYAGE.

Plaintiff states:—

1. That on the       day of       18       , at       , the plaintiff and defendant agreed by charter-party that the defendant's ship, called the       , then at       , should sail to       , or so near there as she could safely get, with all convenient speed, and there load a full cargo of       , or other lawful merchandise from the agents of the plaintiff, and carry the same to       , and there deliver the same on payment of freight.

2. That the plaintiff duly performed all the conditions of the contract on his part.

3. That the said ship, the       , did not, with all convenient speed, sail to       , or so near thereto as she could safely get; but that the defendant caused the said ship to deviate from her said voyage, and abandon the same.

**Measure of Damages.**—Where the charterer has procured suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship, he is entitled to recover compensation for the trouble and expense to which he has been put in procuring such other conveyance.†

Where the contract is for the hire of a ship for a specified time from a specified date, and freights being higher than the contract-price the owner breaks his contract, the charterer is entitled to compensation equal to the difference between the contract price and the price for which he could hire a similar ship for the same time from the same date.‡

\* *Graham & Co. v. Mervanji*, 1. L. R., 5 Bom. 539.

† See ill. b, Contract Act, 1872, s. 73.

‡ See ill. g, Contract Act, 1872, s. 73.



## Form No. 168.

## OWNER AGAINST CHARTERER FOR FREIGHT.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff and defendant agreed by charter-party that the plaintiff's ship called       should, with all convenient speed, sail to       , and that the defendant should there load her with a full cargo of       , or other lawful merchandise, to be carried to       , and there delivered on payment by the defendant to the plaintiff of freight at       Rs. per ton.

2. That the said ship accordingly sailed to       aforesaid, and was there loaded by the defendant with a full cargo of       ; and the plaintiff carried the said cargo in said ship to       aforesaid, and there delivered the same to the defendant, and otherwise performed all the conditions of said contract on his part.

3. That said freight amounted in the whole to the sum of Rs.       .

4. That defendant has not paid the same,

**Who may Sue for Freight.**—Either the master or the owner may sue for freight.\*

**Who are Liable for Freight.**—In ordinary cases, where the cargo is deliverable to the charterer or his assigns, he or they paying freight as per charter-party, the liability of the indorsee of a bill of lading, or consignee, arises, not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods ; and if the bill of lading refers to the charter-party, he is liable as the charterer would have been.† By Act IX. of 1856 the indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass, shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

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\* *Shields v. Davis*, 6 Taunt 65.

† *Lee's Shipping and Insurance*, 9th edition, 322-25.

# CHAPTER IV. ON CONTRACTS OF EMPLOYMENT.

Form No. 169.

## WRONGFUL DISMISSAL.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as an (accountant), and that the defendant should employ the plaintiff as such, for the term of (one year, or as the case may be), and pay him for his services Rs.       monthly (or as the case may be).

2. That on the       day of       18       , the plaintiff entered upon the service of the defendant as aforesaid, and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always had notice.

3. That on the       day of       18       , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

**Indefinite Term is a Hiring for a Year.**—A contract of employment for an indefinite time is generally, though not always, considered a hiring for a year.\*

**Measure of Damages.**—The measure of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained ; the employé is bound to seek for other employment, and any wages which have been, or might have been, gained by such employment, must be deducted from the sum to which he is entitled as compensation.†

Form No. 170.

## THE SAME—WHERE THE EMPLOYMENT NEVER TOOK EFFECT.

Plaintiff states :—

1. (As in last form.)

2. That on the       day of       18       , at       , the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

\* *Beeston v. Collyer*, 4 Bing. 303; *Fawcett v. Cash*, 5 B & Ad. 904; *Baxter v. Nurse*, 6 M. & G. 935; *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J., Ex., 459; *Green v. Wright*, 1 C. P. D. 591-94.

† *Hochster v. DeLaTour*, 22 L. J., Q. B., 458; and see explanation to section 73, Contract Act, 1872.

3. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services, to the damage of the plaintiff Rs.

**When Right to Sue Commences.**—Where the plaintiff had agreed to act as servant to the defendant from an appointed future day, and before that day the defendant refused to employ him, it was held that the plaintiff, immediately upon the refusal, was entitled to consider the contract as at an end.\*

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**Form No. 171.**

**BREACH OF CONTRACT TO SERVE.**

Plaintiff states :—

1. That on the      day of      18      , at      , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at a monthly compensation of Rs.      , and that the defendant should serve the plaintiff as (an artist) for the term of (one year).

2. That the plaintiff has always been ready and willing to perform his part of the said agreement (and on the      day of 18      , offered so to do).

3. That the defendant refused to serve the plaintiff as aforesaid (or that the defendant entered upon the service of the plaintiff on the above mentioned day, but afterwards on the      day of      18      , he refused to serve the plaintiff as aforesaid) to the plaintiff's damage Rs.

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**Form No. 172.**

**BY THE MASTER AGAINST THE FATHER OR GUARDIAN OF AN APPRENTICE.**

Plaintiff states :—

1. That on the      day of      18      , at      , the defendant entered into an agreement, under his hand and seal, a copy of which is hereto annexed (or state the tenor of the contract).

2. That after the making of the said agreement the plaintiff received the said (apprentice) into his service as such apprentice for the

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\* *Hochster v. DeLaTour*, 22 L. J., Q. B., 458; and see section 39, Contract Act, 1872.

term aforesaid, and has always performed, and been ready and willing to perform, all things in the said agreement on his part to be performed.

3. That on the       day of       18       , the said (apprentice) wilfully absented himself from the service of the plaintiff, and continues to do so.

**Form of Contract of Apprenticeship.**—Contracts of apprenticeship must be in the form given in the schedule to Act XIX. of 1850, and that form requires the seal of the parties.

**Liability of Father.**—Although the apprentice may, on attaining his majority, avoid the contract,\* the father or guardian is not discharged thereby.†

**Measure of Damages.**—The master is entitled to damages to the time of suit, and not for the whole term.

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Form No. 173.

BY THE APPRENTICE AGAINST THE MASTER.

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant entered into an agreement with the plaintiff and his (father) E F under their hands and seals, a copy of which is hereto annexed.

2. That, after the making of the said agreement, the plaintiff entered into the service of the defendant after the manner of an apprentice, to serve for the term mentioned in the said agreement, and has always performed all things in the said agreement contained, on his part to be performed.

3. That the defendant has not instructed the plaintiff in the business of       (or state any other breach, such as cruelty, failure to provide sufficient food, or other ill treatment).

**Duty of Master.**—If the apprentice meets with an accident, or becomes ill, so that he cannot work, the master is still bound to keep him in his service, and to provide for him.‡

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\* *Leake on Contracts*, 550; *Cuming v. Hill*, 3 B. & Ald. 50; *Cooper v. Summers*, 7 H. & N. 767; 36 L. J., M. C., 138.

† *Ex parte Davies*, 5 T. B. 715; *Ex parte Gill*, 7 East 376; *King v. Wigston*, 3 B. & C. 484; *Cuming v. Hill*, *supra*; *Leake on Contracts*, 550.

‡ *Crough-Lewis v. Peachey*, 1 H. & C. 518; 31 L. J., Ex., 496.

§ *Reg. v. Smith*, 8 C. & P. 153.

**Nature of Contract.**—A contract of apprenticeship can only arise when there is an undertaking on one side to serve and learn, and on the other to teach; if there be no corresponding engagement on the part of the master to teach, the contract is one of hiring and service only, and not of apprenticeship.\*

## CHAPTER V. ON CONTRACTS OF INDEMNITY.

### Form No. 174.

#### BY RETIRED PARTNER—ON AN AGREEMENT OF INDEMNITY.

Plaintiff states :—

1. That, on the      day of      18      , at      , the plaintiff and defendant, being partners in trade under the firm name of A B & Co., dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That on the      day of      18      , a decree was passed against the plaintiff and defendant at the suit of one E F in the Court of      , upon a debt due from the said firm to the said E F; and on the      day of      18      , the plaintiff paid Rs.      in satisfaction of the same.

4. That the defendant has not paid the same to plaintiff.

**Indemnity Defined.**—A contract of indemnity is one by which one party promises to save the other from loss caused to him by the conduct of the promisor, or by the conduct of any other person.†

**Measure of Damages.**—The promisee may recover (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (2) all costs which he may be compelled to pay in any such suit, if, in bringing or defending it, he did not contravene the orders of the promisor,

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\* *R. v. Shinfield*, 14 East. 541; *R. v. Burback*, 1 M. & S. 370.

† Contract Act, 1872, section 124.

and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.\*

Form No. 175.

AGAINST SURETIES IN BOND OF INDEMNITY.

Plaintiff states :—

1. That on the       day of       18 , the plaintiff and one A B were partners in business as merchants, at       , under the firm name of A B & Co., and thereafter on the same day they dissolved their connection as such partners, and thereupon entered into an agreement in writing, of said date, whereby it was, among other things, mutually agreed that the said A B should retain and keep to his sole and separate use all the partnership property; and in consideration thereof, that he should pay all the debts due by the said firm from his own individual resources, and hold the plaintiff harmless and indemnified of and from any and all claims or liabilities due by said firm, a copy of which agreement is hereto annexed as a part of this plaint, and marked "Exhibit A."

2. That the defendants, in consideration of said agreement between said A B and the plaintiff, entered into an agreement, a copy whereof is annexed hereto as part of this plaint, and marked "Exhibit B," whereby they severally undertook, and bound themselves to the plaintiff for, the faithful performance by the said A B of said agreement.

3. That said A B, under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm; but has not, pursuant thereto, paid and discharged the debts due by said firm, and has failed to hold this plaintiff harmless and indemnified of and from any claims or liabilities due by said firm.

4. That at the time of the dissolution of the partnership, and of the making of the agreement aforesaid, the said firm was indebted to the firm of R & Co., of       , for goods sold and delivered, in the sum of Rs.       , which was then due and payable, which indebtedness

\* Contract Act, 1872, section 125.

formed a part of the Rs.                      , debts of A B & Co., and was included among such debts to be paid by the said A B under his agreement aforesaid with the plaintiff; but the said A B, although requested, would not pay R & Co. their said demand or any part thereof.

5. That the said firm of R & Co. brought a suit against the said A B and plaintiff herein to recover the said sum of Rs.                      in the Court of                      , and, on the                      day of                      18                      , obtained a decree against them for said sum and Rs.                      costs of the suit.

6. That plaintiff has paid Rs.                      the amount of the said decree and costs.

7. That he has demanded from the defendants payment of said sum, but they have not paid the same.

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**Form No. 176.**

**SURETY AGAINST PRINCIPAL DEBTOR.**

Plaintiff states :—

1. That on the                      day of                      18                      , at                      , the defendant, in consideration that the plaintiff would become surety for him, by executing a bond, of which a copy is annexed as a part of this plaint, marked "Exhibit A," agreed with the plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

2. That the plaintiff, confiding in such promise, executed and delivered such bond.

3. That the defendant did not indemnify the plaintiff, and save him harmless from such damages, costs, and charges; but, on the contrary, the plaintiff paid Rs.                      on the                      day of                      18                      , in satisfaction of a decree passed against him, on the                      day of                      18                      , in the Court of                      , in a suit brought by                      on the said bond.

4. That notice thereof was given to the defendant.

5. That plaintiff duly performed all the conditions of the said agreement on his part.

6. That the defendant has not paid the said sum of Rs. to the plaintiff.

**Implied Contract.**—A contract of indemnity may, in general, be implied where one who is only secondarily liable performs under compulsion of law an obligation for which another person is primarily liable.\* In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety.†

**Right of Surety to Securities.**—When a surety has paid off the debt of his principal, not only are all the collateral securities transferred to him, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used.‡

**Limitation.**—In a suit by a surety against the principal debtor, three years from the time when the surety pays the creditor.§ Article 81 does not extend to sureties who have not themselves paid the creditor, but have been compelled to pay contribution to a co-surety who has paid the creditor; such a case would come under article 83.

In a suit by a surety against a co-surety, three years from the time when the surety pays any thing in excess of his own share.||

In a suit upon any other contract of indemnity, three years from the time when the plaintiff is actually damaged.¶

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Form No. 177.

BY THE ACCEPTOR OF AN ACCOMMODATION-BILL.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant requested the plaintiff to accept, for defendant's accommodation, a bill of exchange, bearing date the       day of       18       , drawn by the defendant on the plaintiff, requiring him to pay to the defendant, or order, Rs.       three months after date, and promised the plaintiff that, if the plaintiff would accept the said bill, and deliver the same to the defendant, in order that the defendant might negotiate it for his

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\* *Roberts v. Crowe*, per Willis, J., 7 O. P. 636, 637; 41 L. J., C. P., 209, 201; see also *Nevill's Case*, L. R., 6 Ch. App. 43; 40 L. J., Ch., 1.

† *Contract Act*, 1872, section 145.

‡ *Heera Lal v. Syud Ooseer*, 21 W. R. 346; and see sections 140 and 141, *Contract Act*, 1872.

§ Art. 81, *Limitation Act*, 1877.

|| Art. 83, *Limitation Act*, 1877.

¶ Art. 83, *Limitation Act*, 1877.



own use, the defendant would indemnify and save harmless the plaintiff from any loss or damage by reason of his so accepting and delivering the same to the defendant.

2. That plaintiff accordingly accepted the said bill for the defendant's accommodation, and delivered the same to him for the purpose and on the terms aforesaid.

3. That defendant did not indemnify and save harmless the plaintiff from loss or damage by reason of his so accepting and delivering the said bill to the defendant, and the plaintiff, as acceptor of the said bill, was obliged to pay G H, the holder thereof, the amount of said bill, with Rs. , interest thereon.

4. That defendant had notice thereof, but has not paid the same to plaintiff.

**Measure of Damages.**—Plaintiff may recover not only the amount of the bill, but also the costs which he has been compelled to pay,\* but not the costs of a suit on a bill which he ought to have paid without action.†

**Limitation.**—In a suit by the acceptor of an accommodation bill against the drawer, three years from the time when the acceptor pays the amount of the bill.‡

### Form No. 178.

#### SUB-TENANT AGAINST HIS IMMEDIATE LESSOR.

Plaintiff states:—

1. That at the times hereinafter mentioned, the defendant held certain premises (describe them) as tenant thereof to one A B, at a monthly rent of Rs. , payable by the defendant to said A B on the (state time of payment).

2. That on the day of 18 , in consideration that the plaintiff then became the tenant to the defendant of said premises, at a monthly rent of Rs. , payable by him to the plaintiff, the defendant gave to the plaintiff an agreement to indemnify him, of which the following is a copy (copy agreement).

3. That the defendant, contrary to his agreement, failed to pay the rent for the month of , which was during the tenancy of the plaintiff under said agreement.

\* Jones v. Broke, 4 Taunt. 464; Stratton v. Mathews, 3 Ex. 48.

† Beech v. Jones, 5 C. B. 698; see also Bladon v. Charles, 7 Bing. 246.

‡ Art. 79, Limitation Act, 1877.

4. That, by reason thereof, said A B, on the      day of      18      , commenced proceedings in the Court of      to recover possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff, on      day of      18      , at      , was compelled to pay to the said A B to the use of the defendant, the sum of Rs.      , the amount of said rent, together with Rs.      , the costs and advocate's fees therein.

5. That he has demanded from the defendant payment of the said amounts, but he has not paid the same.

**Implied Contract.**—There is an implied contract of indemnity between the assignee and assignor of a lease in respect of demands which may be made on the assignor by the lessor; and so, when the assignor has, by reason of the assignee's failure to perform the covenants of the lease, been compelled to satisfy such demands by payment, he may recover from the assignee, as well the amount so paid, as the costs reasonably incurred in resisting, or reducing, or ascertaining, the claim made against him.\*

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Form No. 179.

ON AGREEMENT TO INDEMNIFY PLAINTIFF FOR DEFENDING A SUIT.

Plaintiff states :—

1. That on the      day of      18      , one A B brought a suit in the Court of      to recover Rs.      , then in the hands of the plaintiff, which was claimed by the defendant.

2. That afterwards, on the      day of      18      , it was orally agreed between the plaintiff and the defendant that the plaintiff should defend the said suit, and that the defendant should indemnify, and save harmless, the plaintiff from all loss and damage by reason of his defending the same.

3. That plaintiff defended the said suit; but on the      day of      18      , the said A B obtained a decree against the plaintiff in said suit for Rs.      , and for Rs.      costs of suit.

4. That defendant has not indemnified and saved harmless the plaintiff from all loss and damage by reason of his defending the said

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\* *Pepin v. Chunder Seeker*, I. L. B., 5 Cal. 811.

suit, whereby the plaintiff has been obliged to pay, and has paid, Rs.            for costs of said suit, and a further sum of Rs.            incurred by plaintiff for his own costs and expenses in and about defending the said suit.

**When Cause of Action arises.**—The cause of action accrues on payment of the costs.\*

## CHAPTER VI.

### ON CONTRACTS FOR THE SALE OF GOODS.

#### Form No. 180.

#### FOR REFUSING TO RECEIVE AND PAY FOR GOODS.

Plaintiff states :—

1. That on the       day of       18   , at       , the plaintiff and defendant mutually agreed as follows :—(state the agreement).
2. That the plaintiff duly performed all the conditions of said contract on his part, and was, on the       day of       18   , at       (the day and place of delivery), ready and willing to deliver said goods, and tendered the same to the defendant.
3. That defendant refused to accept said goods, or to pay for them.
4. That the market-value of similar goods at       , on the day of       18   , was Rs.       (or that plaintiff thereupon sold said goods for the best price obtainable, which was Rs.       ).

**Goods Defined.**—“Goods” means, and includes, every kind of moveable property.† Currency notes are not “goods” within the meaning of the Contract Act 1872.‡ Jewels, which are materials used in religious worship, are, by all systems of law, absolutely *extra commercium*, and not the objects of sale.§

**When the Property in Goods Sold passes.**—The property in *ascertained* goods passes to the buyer when the whole or any part of the price, or when the earnest, is paid, or when the whole or any part of the goods is delivered. When the parties agree, expressly or by implication, that the payment or delivery, or both,

\* *Collinge v. Heywood*, 9 A. & E. 633.

† Contract Act, 1872, s. 76.

‡ In the matter of *Captain Michell*, 1 C. L. E. 339.

§ *Raja Raja Varma v. Revi Rama*, 7 Mad. H. C. E. 210.

shall be postponed, the property passes as soon as the proposal for sale is accepted.\* When moveable and immoveable property are sold together, the ownership in the former does not pass before transfer of the latter.† When the goods have yet to be ascertained, made, or finished, or when anything is first to be done to them, or the price has to be ascertained, the property in them does not pass until they have been ascertained, made, or finished, or until such thing is done to them, or until the price has been ascertained.‡

**Buyer's Risk.**—When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.§

**Title.**—No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases : (1) where he is in possession, by the consent of the owner, of the goods, or of documents evidencing title to the goods ; (2) when he is a joint-owner of the goods, in sole possession with the consent of the co-owners ; (3) when he has obtained possession of the goods under a contract voidable at the option of the other party thereto.||

The possession which is meant by the first part of exception 1 of section 106 of the Contract Act, 1872, is a possession which is unqualified, such as an owner has ; the exception does not apply where there is a qualified possession, such as a hirer of goods has, or when the possession is for a specific purpose.¶

**Measure of Damages.**—In a suit against the purchaser of goods for refusal to accept, where the time for delivery is fixed, the seller is entitled to receive, as compensation, the amount, if any, by which the contract-price exceeds that which he can obtain at the time of the refusal to accept ;\*\* and, where the time for delivery is fixed, the seller is entitled to receive the difference between the contract-price and the market-price at the time fixed.††

### Form No. 181.

#### FOR NOT RETURNING GOODS, OR PAYING FOR THEM WITHIN A REASONABLE TIME.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff, at the request of the defendant, delivered to him (describe the goods) of the value of Rs.       , upon the condition that defendant would

\* Contract Act, 1872, s. 78.

† Contract Act, 1872, s. 85.

‡ Contract Act, 1872, ss. 79, 80, and 81.

§ Contract Act, 1872, s. 86.

|| Contract Act, 1872, s. 108.

¶ Greenwood v. Holquette, 20 W. R. 467.

\*\* See ill. c, s. 73, Contract Act, 1872.

†† See ill. c, s. 73, Contract Act, 1872.

purchase the same for Rs. , or return the same to the plaintiff within a reasonable time, which the defendant then and there agreed to do.

2. That the plaintiff duly performed all the conditions of said agreement on his part.

3. That a reasonable time for the defendant to purchase and pay for said goods, or return the same to the plaintiff, has elapsed before the commencement of this suit.

4. That the defendant has not purchased said goods or paid for them, nor has he returned the same to the plaintiff.

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Form No. 182.

FOR A DEFICIENCY ON A RE-SALE.

Plaintiff states:—

1. That on the      day of      18      , at      , he put up at auction, at the auction-rooms of A B and Co., sundry goods, subject to the condition that all goods not paid for and removed by the purchaser thereof within      days after the sale, should be re-sold at auction on his account, of which condition the defendant had notice.

2. That defendant purchased two hundred bags of gram, at the said auction, at the price of Rs.      .

3. That the plaintiff was ready and willing to deliver the same to defendant on the said day, and for      days thereafter, and on the day of      18      , offered to do so, and demanded payment therefor.

4. That defendant did not take away, or otherwise receive, the said goods purchased by him, nor pay for them within      days after the sale, nor since.

5. That on the      day of      18      , at      , having first given the defendant reasonable notice of the time and place of re-sale, the plaintiff re-sold the said two hundred bags of gram, on account of the defendant, by public auction, for Rs.      .

6. That the expenses attendant upon such re-sale amounted to Rs.      .

7. That the defendant has not paid the deficiency thus arising, amounting to Rs.

**When Buyer may Re-sell.**—Where defendant committed a breach of contract in not accepting goods, the plaintiffs were justified in re-selling them at once, and suing for damages.\*

**Notice of Re-sale.**—The seller may re-sell on giving reasonable notice.† What is reasonable notice must depend upon circumstances; a shorter notice would suffice in the case of perishable goods, or goods the price of which may alter in a few days or hours.‡

**Sale by Auction—Transfer of Ownership.**—When goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership is transferred as each lot is knocked down.§

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Form No. 183.

FOR NOT DELIVERING GOODS SOLD.

Plaintiff states:—

1. That on the      day of      18      , at      , the plaintiff and defendant mutually agreed that the defendant should deliver one hundred bags of rice to the plaintiff on the      day of      18      , and that the plaintiff should pay therefor Rs.      on delivery.

2. That on the said day the plaintiff was ready and willing and offered to pay the defendant the said sum upon delivery of the said goods.

3. That defendant has not delivered the same, whereby the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

**Delivery Where to be Made.**—Unless the seller agreed to deliver, the purchaser must fetch them.||

**Seller's Lien.**—Unless otherwise provided by the contract of sale, the seller has a lien on the goods for the price.¶

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\* *Simson v. Gora Chand Doss*, 1. L. R., 9 Cal. 473.

† *Contract Act*, 1872, s. 107.

‡ *Buchanan v. Awdall*, 15 B. L. R. 270.

§ *Contract Act*, 1872, s. 123.

|| *Contract Act*, 1872, s. 93.

¶ *Contract Act*, 1872, s. 96.

**Measure of Damages.**—When the goods are to be delivered on a future day, the damages for breach of contract are the difference between the contract-price, and the market-price of the goods on the day when they ought to have been delivered.\*

When the purchaser informs the seller that the goods are required in order to fulfil a particular contract, the seller must pay the purchaser a sum equal to the profit which he would have made if he had been able to carry out his contract with the third party.†

**Effect of Sale "to Arrive."**—A sale of goods "on arrival," or "to arrive" in a particular ship, is a contract for a sale of goods at a future period, subject to the double condition of the arrival of the ship, and the goods being on board; but it is not a warranty by the seller that the goods will arrive;‡ and where the sale-contract contains the words "now in the course of landing or in the said godowns" and "now on board ship, and, as a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on board ship, it was held that under the circumstances those words formed no part of the contract.§ When the contract is for the sale of goods "now on passage, and expected to arrive by," or "to be delivered on safe arrival of" a certain ship, it is conditional on the arrival of the ship only.||

**Effect of Sale of "Entire Cargo."**—Where the defendants contracted to buy "the entire cargo of coal per *Culsean*, amounting to 900 tons or thereabouts," and the *Culsean* arrived with 2,167 tons of coal, it was held that the defendants were not bound to accept a portion of the cargo; for a person who contracts to buy a cargo, or an "entire cargo," is not bound to accept goods which, though answering in quantity and quality as that of the cargo purchased, are not, in fact, *the cargo*, by reason that the ship has other cargo, and particularly of the same description on board.¶

### Form No. 184.

#### FOR DELIVERING GOODS NOT AS CONTRACTED FOR.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff 4,000 gunny bags at the price of Rs.       for each hundred, for which the plaintiff agreed to pay the defendant Rs.       .

\* *Gainsford v. Carroll*, 2 B. and C. 624; *Valpy v. Oakley*, 16 Q. B. 941; L. J., 20 Q. B. 880; and see ill. o, Contract Act, 1872, s. 73.

† Ill. A, Contract Act, 1872, s. 73.

‡ *Boyd v. Siffkin*, 3 Camp. 326; *Smith v. Myers*, L. R., 5 Q. B. 429; L. R., 7 Q. B. 139.

§ *Carlises, Nephews, & Co. v. Hurmook Roy*, I. L. R., 9 Cal. 679.

|| *Gorissen v. Perrin*, 2 C. B., N. S., 681; L. J., 27 O. P. 29; *Hale v. Rawson*, 4 C. B., N. S., 85; L. J., 27 C. P. 189.

¶ *Forbes v. Tullockchand*, I. J. R., 3 Bom. 396.

2. That the plaintiff duly performed all the conditions of said agreement on his part.

3. That defendant did manufacture said gunny bags under said agreement, but manufactured them in an unskilful and unworkman-like manner (state wherein the goods differ from article contracted for).

4. That on account of such (state the defect) the said gunny bags were of no use to the plaintiff, and the plaintiff sold them by auction, in order to dispose of them; and the same realized, after deducting the expenses of such auction, Rs. , being Rs. less than the price paid therefor by the plaintiff to defendant.

### Form No. 185.

#### WARRANTY OF TITLE TO GOODS SOLD.

Plaintiff states:—

1. That on the day of 18, at , the defendant sold to the plaintiff (state what) for Rs. .

2. That by said contract of sale it was understood by the plaintiff and defendant to be, and it was a part of the terms and consideration of said contract of sale, that the defendant had the lawful right and title to so sell, and to transfer the ownership of said goods to the plaintiff.

3. That the defendant had, in fact, no right or title to sell or dispose of said goods.

4. That one E F then was the owner of said goods, and afterwards, on the day of 18, he demanded possession of the same from the plaintiff; and the plaintiff was compelled, and did then deliver them up to E F, and they were wholly lost to the plaintiff.

5. That by reason of the premises the plaintiff was misled and injured to his damage Rs. .

**Warranty Defined.**—Warranty has been defined as an express or implied statement of something which the party undertakes shall be part of a contract, and though part of a contract, yet collateral to the express object of it.\* The word "warrant" need not be used; it is sufficient if the statement was so understood by the parties.†

\* *Charles v. Hopkins*, per Lord Abinger, 4 M. and W. at p. 404.

† *Pasley v. Freeman*, per Buller, J., 3 T. R. 57; 2 Smith's L. C., 8th ed., p. 66, Benjamin on Sales, 485; Leake on Contracts, 408, 404.



**Warranty of Title.**—In England on a sale of goods there is no warranty of title; but, by section 109 of the Indian Contract Act, 1872, the seller is responsible to the buyer, if, by reason of the invalidity of the former's title, the latter is deprived of the goods.

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Form No. 186.

WARRANTY OF QUALITY.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant warranted a steam-engine to be in good working order, and thereby induced the plaintiff to purchase the same of him, and to pay him Rs.       therefor.

2. That the said steam-engine was not then in good working order, whereby the plaintiff incurred expense in having the said engine repaired, and lost the profits which would otherwise have accrued to him while the engine was under repair.

**Implied Warranties.**—On the sale of ascertained goods there is no implied warranty of soundness or quantity;\* but an implied warranty of goodness or quality may be established by the custom of any particular trade.†

On a sale of goods by sample there is an implied warranty that the bulk is equal in quality to the sample.‡

Where goods are sold as being of a certain denomination there is an implied warranty that they are such goods as are commonly known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.§

Where goods have been sold for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.||

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\* *Parkinson v. Lee*, 2 East. 314; *Dickson v. Zinimia*, 10 C. B. 610; *Jones v. Just*, L. R., 3 Q. B. 197, 202; 37 L. J., Q. B., 89; *La Neuville v. Nourse*, 3 Camp. 351.

† Contract Act, 1872, s. 110.

‡ Contract Act, 1872, s. 112; *Parker v. Palmer*, 4 B. and Ald. 387.

§ Contract Act, 1872, s. 113; *Randall v. Newson*, 2 Q. B. D. at p. 109; *Joeling v. Kingsford*, 32 L. J., C. P., 94; *Nichols v. Godtz*, 23 L. J., Ex., 314; *Arzomar v. Casella*, L. R., 2 C. P. 431.

|| Contract Act, 1872, s. 114; *Jones v. Just*, L. R., 3 Q. B., at p. 203.

Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of fitness for any particular purpose ;\* but it has been held in England that where the goods are sold by a manufacturer, there is an implied warranty that they are of his own manufacture.†

**Measure of Damages.**—For breach of warranty the measure of damages, if the goods are returned, is the price paid, but when the buyer elects to keep the goods, the measure of damages is the difference between the value of the goods delivered, and those contracted for ; and when the buyer has re-sold, he may also recover any damage he has been compelled to pay the buyer on such re-sale.‡ The fact that a rise in the market has made the inferior article sell for the price agreed is immaterial.§ Evidence of the price obtained on a re-sale before discovery of the breach of warranty is admissible to show the value of the goods as warranted ; and on a re-sale after discovery, to show the real value of the goods.|| If the goods were bought for a particular purpose communicated to the seller, he may be liable for special damages.¶

**Buyer's Right to keep Goods for Examination.**—When the goods have been sold by description or sample, the buyer is entitled to keep them a reasonable time in order to ascertain if they answer the description, or are equal to sample ; and if they do not, he may then reject them ;\*\* in such case he need not return the goods to the seller, and they remain at the latter's risk.†† But if the buyer exercise any act of ownership over the goods, he cannot reject them.‡‡

**Buyer's Remedies.**—A breach of warranty of goods sold and delivered does not entitle the purchaser to return them, and sue for the price ; he can only sue for damages for breach of warranty ;§§ but on a sale of unascertained goods the buyer may accept or refuse the goods on a breach of warranty, and in either case is entitled to compensation, provided that, if he accepts the goods, he must give notice within a reasonable time that he intends to claim compensation.|||

\* Contract Act, 1872, s. 115.

† *Johnson v. Kaylton*, 7 Q. B. D. 488.

‡ Contract Act, 1872, s. 73, ill. m ; *Lewis v. Peake*, 7 Taunt. 153.

§ *Jones v. Just*, L. E., 3 Q. B. 197.

|| *Clare v. Maynard*, 6 A and E. 519 ; *Godwin v. Francis*, 39 L. J., C. P., 121.

¶ *Dingh v. Hare* 29 L. J., C. P., 143.

\*\* Contract Act, 1872, s. 118 ; *Heilbull v. Hickson*, L. E., 7 C. P. 438 ; 41 L. J., C. P., 228 ; *Lucy v. Mouglet*, 5 H. and N. 233 ; 29 L. J., Ex., 110.

†† *Grimoldby v. Wells*, L. E., 10 C. P. 391 ; 44 L. J., C. P., 203 ; *Heilbull v. Hickson*, *supra*.

‡‡ Contract Act, 1872, s. 118 ; *Chapman v. Morton*, 11 M. and W. 534 ; *Parke v. Wallis*, 5 E. and B. 21.

§§ Contract Act, 1872, s. 117 ; *Street v. Blay*, 2 B. and Ald. 456 ; *Gompertz v. Denton*, 1 C. and M. 207.

||| Contract Act, 1872, s. 118.

Form No. 187.

WARRANTY OF SOUNDNESS.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant sold to the plaintiff a horse for Rs.      .

2. That by the said contract of sale the defendant warranted the said horse to be sound, and thereby induced the plaintiff to purchase the same of him, and to pay him therefor the said price of Rs.      .

3. That the said horse was at the time of said sale unsound in this, that (state wherein he was unsound).

4. That the plaintiff was misled and injured thereby, and has sustained damages by reason of the premises, to the amount of Rs.      .

**Sale of Provisions—Implied Warranty.**—On the the sale of provisions there is an implied warranty that they are sound.\*

**Servant's Authority.**—An agent or servant employed to sell a thing has an implied authority to warrant.†

**Measure of Damages.**—Where a cow was sold warranted free from disease, in a suit for the breach it was held that the plaintiff might recover the value of cattle which had died of rinderpest communicated by the cow sold.‡

Form No. 188.

WARRANTY OF A NOTE.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant offered to pass to the plaintiff, for valuable consideration, a promissory note, of which the following is a copy (copy of the note), and he then and there warranted the said note to have been made by the said A B.

2. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid therefor the sum of Rs.      .

3. That the said note was not made by said A B; that his name was forged thereto.

4. That by reason of the premises the plaintiff was injured and misled to his damage Rs.      .

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\* Contract Act, 1872, s. 111.

† Brady v. Todd, 9 C. B., N. S., 592; 30 L. J., C. P., 223.

‡ Smith v. Green, 45 L. J., C. P., 29.

CHAPTER VII.

ON CONTRACTS FOR THE SALE OF LAND.

Form No. 189.

PURCHASER AGAINST VENDOR FOR BREACH OF AGREEMENT  
TO CONVEY.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff and defendant entered into an agreement under their hands, of which the following is a copy (insert copy of contract).

[Or, That on, &c., the defendant agreed with the plaintiff that, in consideration of a deposit of Rs.       then paid, and of the further sum of Rs.       payable as hereinafter mentioned, he would, on the day of       18       , at       , execute to the plaintiff a sufficient conveyance of (describe the land) free from incumbrances ; and the plaintiff agreed to pay Rs.       for the same on delivery thereof.]

2. That on the       day of       18       , the plaintiff demanded the conveyance of the said property from the defendant, and tendered Rs.       to the defendant (or that all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part).

3. That the defendant has not executed any conveyance of the said property to the plaintiff (or that there is a mortgage upon the said property made by       to       for Rs.       registered in the office of       on the       day of       18       , and still unsatisfied (or any other defect of title).

4. That the plaintiff has thereby lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant. Wherefore plaintiff prays for decree for Rs.       compensation.

**Rights of Purchaser.**—When a person contracts to sell or let certain property having only an imperfect title thereto, the purchaser or lessee has the following rights :—

- (a) if the vender or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;
- (b) when the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;
- (c) when the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has, in fact, only a right to redeem it, the purchaser may compel him to redeem the mortgage, and to obtain a conveyance from the mortgagee;
- (d) when the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of suit, and to a lien for such deposit, interest, and costs, in the interests of the vendor or lessor, in the property agreed to be sold or let.\*

**Purchaser's Remedies.**—When there is default on the part of the vendor the purchaser may either (1) rescind the contract, and sue for the deposit, as for money received to his use; or (2) he may affirm the contract, and sue for damages or (3) he may simply defend a suit against him for the balance of the purchase-money.†

**Measure of Damages.**—The rule in England seems to be that, where the failure of the vendor to make a good title arises from no fault of his own, the purchaser is not entitled to recover damages for the loss of his bargain, but only expenses actually incurred;‡ but where the failure to make a good title arises from the vendor's default, it is otherwise, and the purchaser may recover, not only the amount of the deposit with interest thereon§ and expenses of examining the title, but the profit on a re-sale of the premises and the cost of conveyance to the sub-vendee;|| and, where he has acted properly in raising the purchase-money, also interest thereon whilst lying idle.¶ The price at which the vendor has resold the property has been considered *prima facie* proof of its market value.\*\*

**When Time is of the Essence of the Contract.**—When time is of the essence of the contract, on the default of the vendor to make out a title, it is voidable

\* Specific Relief Act, 1877, s. 19.

† Dart. V. and P. 945.

‡ Bain v. Fothergill, L. R., 7 H. L. 158.

§ DeBermalles v. Wood, 3 Camp., 258; Farquhar v. Farley, 7 Taunt. 592.

|| Engell v. Fitch, L. R., 4 Q. B. 659.

¶ See Sherry v. Oke, 3 Dowe, 349; Howland v. Norris, 1 Cox. 59.

\*\* Godwin v. Francis, 39 L. J., O. P., 121.

at the option of the promisee.\* In contracts for the sale of land, time is of the essence of the contract, where the property is of a fluctuating value; or where the purchaser requires the property for his residence, or for some immediate purpose;† and, of course, where the parties agree to that effect. And although time may not originally have been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified time.‡

**Sale How Effected.**—Where the Transfer of Property Act, 1882, is in force, a sale of tangible immoveable property of the value of one hundred rupees and upwards, or of a reversion, or other intangible thing, can be made only by a registered document; and a sale of tangible immoveable property of a value less than one hundred rupees may be made either by a registered instrument, or by delivery of the property.§

**Execution under Power of Attorney.**—When the conveyance is executed under a power of attorney, the proper course seems to be to let the purchase-money be invested in the names of trustees, at the expense and risk of the vendor, until satisfactory evidence is adduced of the validity of the power at the date of the execution of the conveyance.||

**Purchaser to prepare Conveyance.**—It is the duty of the purchaser to prepare the conveyance, and tender it for execution to the vendor.¶

**Purchaser's Right to Deeds.**—In general, the purchaser of the *whole estate* is, upon completion, entitled to all deeds and other muniments of title, however ancient, which are in the possession or power of the vendor.\*\*

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### Form No. 190.

#### AVERMENT OF EXCUSE FOR NON-PERFORMANCE.

That on the       day of       18       , at       , and before time for performance had arrived, the defendant falsely and fraudulently represented to the plaintiff that he had sold       to others, and that, relying on said representations, and solely by reason thereof, the plaintiff was not prepared to receive and pay for the same, as he otherwise would have been.

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\* See Contract Act, 1872, s. 56.

† Dart. V. and P. 419.

‡ Dart. V. and P. 422.

§ Section 54.

|| Dart. V. and P. 661.

¶ Dart. V. and P. 509.

\*\* Dart. V. and P. 678.

## Form No. 191.

**VENDOR AGAINST PURCHASER FOR BREACH OF AGREEMENT  
TO PURCHASE.**

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff and defendant entered into an agreement hereunto annexed and marked "Exhibit A," whereby it was agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff (describe the land), for Rs.       .

2. That on the       day of       18       , at       , the plaintiff, being then the absolute owner of the said property, and the same being free from all incumbrances, as was made to appear to the defendant, tendered to the defendant a sufficient instrument of conveyance of the same (or was ready and willing and offered to convey the same to the defendant by a sufficient instrument) on payment by the defendant of the said sum.

3. That defendant has not paid the said sum.

**Measure of Damages.**—It has been held in England that where the vendor remains the owner of the property he cannot recover the unpaid purchase-money as a debt, but must sue for breach of contract, the measure of damages being the difference between the agreed purchase-money and the estimated saleable value of the land, together with interest on the purchase-money, and the expenses incurred.\*

**Necessary Averments.**—The allegation of plaintiff's readiness and willingness to convey implies the ability to do so, and is a sufficient averment of title.†

**Vendor's Remedies.**—A vendor of immoveable property, who has given possession to the purchaser, is not entitled to rescind the contract and recover possession because the purchase-money is not paid; his remedy is to sue for the sum due, and he has a lien on the property for the amount.‡

## Form No. 192.

**AVERMENT OF EXCUSE FOR NON-PERFORMANCE.**

That on the       day of       18       , and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff that he had determined not to take the land; and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage, Rs.       .

\* See *Laird v. Prin*, 7 M. and W. 474; and *Dart. V. and P.* 985.

† *DeMedina v. Norman*, 9 M. and W. 820.

‡ *Trimalrav Raghavendra v. Municipal Commissioners of Hubli*, I. L. R., 3 Bom. 173.

**Form No. 193.**

**VENDOR AGAINST PURCHASER FOR NOT COMPLETING PURCHASE.**

**Plaintiff states :—**

1. That by an agreement in writing, dated the       day of 18       , it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff (describe the property), at the price of Rs.       , upon the terms and conditions following (that is to say) :—

(a) That the defendant should pay the plaintiff a deposit of Rs.       in part of the said purchase-money on the signing of the said agreement, and the remainder on the day of       18       , on which day the said purchase should be completed.

(b) That the plaintiff should deduce and make a good title to the said premises on or before the       day of       18       , and, on payment of the said remainder of the said purchase-money as aforesaid, should execute to the defendant a proper conveyance of the said premises to be prepared at the defendant's expense.

2. That all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part; yet the defendant did not pay the plaintiff the remainder of the said purchase-money as aforesaid on his part.

3. That the plaintiff has thereby lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

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**Form No. 194.**

**VENDOR AGAINST PURCHASER FOR NOT FULFILLING AGREEMENT  
AND FOR DEFICIENCY ON RE-SALE.**

**Plaintiff states :—**

1. That this plaintiff was the owner of four lots situated in the town of       , to wit, lots Nos. 1, 2, 3, and 4 in block       ; that he put them up for sale at auction at the auction-rooms of C D and Co.,



in the town of                   , on the    day of    18   , and announced before the commencement of the sale as part of the terms of sale that ten per cent. of the purchase-money was on the day of sale to be paid by the purchaser to the auctioneers C D and Co., and that, if any purchaser failed to make such payment, the lots would be re-sold, and the purchaser be charged with the deficiency.

2. That at the said sale, A B, the defendant, bid for, and became the purchaser of, each and all of the said lots for the price of Rs.                   for each lot.

3. That the said defendant did not, on the day of such sale, or at any other time, pay ten per cent., nor any part of the price bid, nor the purchase-money, nor any part thereof.

4. That in consequence of such neglect of payment, and after notice given to the defendant of the time and place when and where the said lots should be re-sold on his account, and that he would be charged with the deficiency, the said lots were put up for sale and re-sold at the price of Rs.                   for each lot, making a deficiency of Rs.                   upon the said four lots.

5. That defendant has not paid said deficiency.

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Form No. 195.

WARRANTY OF TITLE.

Plaintiff states :—

1. That on the    day of    18   , at    , the defendant, by an instrument in writing, duly executed and registered, in consideration of Rs.                   , sold and conveyed to the plaintiff certain land (describe it).

2. That the defendant, by the said instrument, contracted with the plaintiff that he had good title to the said property, and would defend the plaintiff in his possession of the same.

3. That the defendant had not, at the time of the execution of said deed, a good and sufficient title to said premises; but one A B was then the lawful owner of said land.

4. That on the    day of    18   , the said A B ousted and dispossessed the plaintiff of the said premises by due course of law.

5. That plaintiff has been compelled to pay the costs and charges sustained by the said A B in prosecuting his suit in the Court of for the recovery of the said premises, which amounted to Ra. , and to pay out the additional sum of Ra. in endeavouring to defend such suit.

**Want of Title.**—*Caveat Emptor.*—By the rule of *caveat emptor*, the buyer is bound by law to take care of himself, and see that he buys after satisfying himself that there is a good title; he is bound to look not only to his own title, but to see that he is properly indemnified by the covenants in his deed of purchase; for if a deed has been once executed, unless there is an eviction by the vendor or some person claiming under him, the purchaser has no right of action against the vendor.\*

**Necessary Averments.**—In a suit for an alleged breach of covenant for title, it is not enough to prove unsuccessful proceedings to recover possession from third parties, or even an eviction by third parties, in order to prove a breach of such covenant as against the covenantor and his representatives; such proceedings are not necessarily, though they may happen to be, binding, and the plaintiff has, in general, to prove as against the covenantor, and his representatives, not only that the plaintiff's proceedings to recover possession had been unsuccessful, or that an eviction of the plaintiff had taken place, but that such proceedings were *rightfully* unsuccessful, or that such eviction was *rightful*. In other words, he has to prove, as against the covenantor or his representatives, that the title was bad by reason of some act, or fact, covenanted against. Otherwise it would be very easy for any purchaser, who had repented of his bargain, to get up collusive proceedings, either as plaintiff or defendant, and then sue the covenantor to recover purchase-money and interest.†

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### Form No. 196.

#### ALLEGATION OF EVICTION.

That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, one C D lawfully claimed the same premises by a paramount title, and afterwards in a suit brought by him in the Court of , in which the said C D was plaintiff, and this plaintiff was defendant, the said C D, on the day of 18 , obtained a decree, which was duly given by said Court against this plaintiff for possession of the premises, and on the day of 18 lawfully entered the premises and ousted the plaintiff therefrom, and still lawfully holds the plaintiff out of the possession thereof.

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\* Gour Kishore Shaha v. Chunder Ghose, 25 W. R. 45.

† Raju Balu v. Krishnarav, I. L. R., 2 Bom. 272, 287.

Form No. 197.

ALLEGATION OF SPECIAL DAMAGE.

That by reason thereof the plaintiff has not only lost said premises, but also the sum of Rs.                      by him laid out and expended in and upon the said premises in repairing and improving the same, and also the sum of Rs.                      costs and charges sustained by the said A B in prosecuting his suit for the recovery thereof, and the sum of Rs.                      for his own costs, charges, and advocate's fees in defending said suit.

Form No. 198.

BY ASSIGNEE OF GRANTEE.

Plaintiff states :—

1. (Allege sale to one C D.)

2. (Allege warranty.)

3. That the said C D afterwards, on the                      day of                      18                      , at                      , by an instrument duly executed and registered, in consideration of the sum of Rs.                      , conveyed the said premises to E F, his heirs and assigns; and the said E F afterwards, on the                      day of                      18                      , at                      , by an instrument duly executed and registered, in consideration of Rs.                      , conveyed the same premises to the plaintiff.

4. That the plaintiff afterwards, on the                      day of                      18                      , at                      , entered into, and was possessed of, said premises.  
(Set forth breach, &c., as in preceding forms.)

**Covenants which Run with the Land.**—At Common law certain covenants run with the land; that is to say, the burthen and benefit of the covenants pass to the assignee of the reversion and of the term. These are: where the covenant refers to a thing *in esse*, parcel of the thing demised, as to keep a house on the demised premises in repair, the benefit of the covenant here passes to the assignee, although the word "assigns" does not appear in the lease; but when the covenant relates to something to be done on the land demised, as to build a fence thereon, it does not pass to the assignee.\*

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\* The leading case on this subject is *Spencer's Case*, 1 Smith's L. C. 68 *et seq.*

**Form No. 199.**

**BY HEIRS OF GRANTEE.**

Plaintiffs state :—

1 and 2. (Allege sale and warranty.)

3. That the said C D afterwards, and on the same day, entered into, and was possessed of, said premises, and afterwards, on the day of 18 , at , the said C D died, whereupon the said premises and his estate therein descended to the plaintiffs as children and co-heirs of the said C D, deceased; and that they afterwards, on the same day, entered into, and were possessed of, said premises, until ousted and dispossessed as hereinafter mentioned.

(Set forth breach, &c., as in preceding forms.)

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**Form No. 200.**

**BY DEVISEE OF GRANTEE.**

Plaintiff states :—

1. & 2. [Allege sale and warranty.]

3. That the said E F afterwards, and on the same day, entered into, and was possessed of, said premises; and afterwards, on the day of 18 , at , made his last will and testament, and thereby, amongst other things, devised the said premises to the plaintiff; and afterwards, on the day of 18 , at , the said E F died leaving such will.

4. That on the day of 18 , the said will was proved, and admitted to probate, in the Court of .

5. That thereupon the plaintiff entered into possession of the said premises, and was possessed thereof until ousted and dispossessed as hereinafter mentioned (set forth breach, &c., as in preceding forms).

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**Form No. 201.**

**WARRANTY AS TO QUANTITY.**

Plaintiff states :—

1. That by an instrument in writing, bearing date the day of 18 , the defendant sold to the plaintiff, and the plaintiff bought from the defendant (here describe the land), at the price of Ra. ; and by the said instrument the defendant warranted the

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same to contain                      acres of land, and thereby induced the plaintiff to purchase the same.

2. That the said land contained only                      acres, instead of                      acres, the quantity sold to the plaintiff by defendant.

3. That plaintiff was damaged thereby in the amount of Rs.                      .

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**Form No. 202.**

**INCUMBRANCES.**

Plaintiff states:—

1. That by an instrument in writing, dated the                      day of                      18                      , the defendant, in consideration of Rs.                      to him paid, sold to the plaintiff (describe the property), and by the said instrument contracted with the plaintiff as follows: (or contracted with the plaintiff that the said premises were free from all incumbrances).

2. That at the time of the execution of the said contract the premises were not free from all incumbrances, but, on the contrary, the defendant before that time, on the                      day of                      18                      , at                      , by an instrument in the nature of a mortgage, duly executed and registered, had mortgaged the said premises to one A B to secure the payment of Rs.                      with interest.

3. And for a further breach, the plaintiff alleges that at the time of the making of the said contract the premises were subject to a tax, theretofore duly assessed, charged, and levied upon the said premises by                      of the sum of Rs.                      , and which tax was then remaining due and unpaid, and was, at the time of the making of the said contract, a lien and incumbrance by law upon the said premises.

4. That by reason thereof the plaintiff paid on the                      day of                      18                      , the sum of Rs.                      in extinguishing (here state whether mortgage, lien, tax, or other incumbrances, or all of them) aforesaid to his damage Rs.                      .

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**Form No. 203.**

**THE SAME—WHERE THE CONVEYANCE EXCEPTED A SPECIFIC INCUMBRANCE.**

Plaintiff states:—

1. That by an instrument in writing, dated the                      day of                      18                      , the defendant, in consideration of Rs.                      to him paid, sold to the plaintiff (here describe the property),

2. That by the said instrument the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage registered in the office of the sub-registrar of                      in Book A of mortgages; and no other incumbrances were mentioned or specified in said instrument, as existing upon or affecting said premises, or the title thereto.

3. That by the said instrument the defendant contracted with the plaintiff as follows: (copy the words of the contract).

4. That at the time of the execution of the said instrument, the said premises were not free from all incumbrances other than the mortgage therein excepted, but, on the contrary (here set out any incumbrances as breaches, and conclude as in preceding form).

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**Form No. 204.**

**POWER TO CONVEY.**

**Plaintiff states:—**

1. That by an instrument in writing, dated the            day of 18   , the defendant, for a valuable consideration, conveyed to the plaintiff (describe the property), and by the said instrument contracted with the plaintiff as follows:—

2. That at the time of the execution of the said instrument, the defendant was not the true, lawful, and rightful owner, and had not in himself, at the said time, good right, full power, &c. (negative the words of the contract).

3. Whereby plaintiff has sustained damage in the sum of Rs.           .

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**Form No. 205.**

**GRANTEE'S BREACH OF CONTRACT TO BUILD.**

**Plaintiff states:—**

1. That in consideration that the plaintiff would sell and convey to the defendant a piece of land (describe it) for the sum of Rs.           , the defendant, on the            day of            18   , agreed that he would, erect upon the premises a good brick-house, to be occupied as a dwelling, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

2. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum ; but defendant has not erected a good brick-house on the land to be occupied as a dwelling, but, on the contrary, has erected upon said premises a wooden building to be used as a slaughter-house.

3. That the defendant has prevented other lots in the vicinity, owned by the plaintiff, from becoming valuable to the plaintiff, as they otherwise would have become, and has injuriously affected their condition, and hindered the plaintiff from selling them, to his damage Rs.

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**Form No. 206.**

**NUISANCES—GRANTOR AGAINST GRANTEE.**

**Plaintiff states :—**

1. That by an instrument in writing, dated the      day of 18   , the plaintiff sold and conveyed to the defendant, for a valuable consideration, a piece of land (describe it).

2. That by the said instrument defendant contracted with the plaintiff as follows : (copy the words of the contract).

3. That the defendant has erected, and suffered and permitted to be erected, on said premises, a building occupied and used as a slaughter-house.

4. That the offal and blood in, and carried out from, said slaughter-house, and the offensive smell created thereby, is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining, to his damage Rs.

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**Form No. 207.**

**ON A CONTRACT TO MAINTAIN A FENCE.**

**Plaintiff states :—**

1. That on the      day of      18   , the plaintiff and defendant then were the owners of lands adjoining, situated (describe them), and then made an agreement in writing, of which the following is a copy (copy agreement).

2. That the plaintiff has duly performed all the conditions thereof on his part.

3. That the defendant did not, after the erection of said fence, maintain the same, and keep it in continual repair, but, on the contrary, in the month of 18 , he suffered the same to become dilapidated and broken down, and to remain in that condition from that time until the day of 18 .

4. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit-trees, by cattle coming through said dilapidated fence from the defendant's land upon the plaintiff's premises, and that plaintiff was compelled to repair and re-build said fence in order to protect his land from the damage caused by said cattle, to the damage of plaintiff Rs.

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Form No. 208.

ON A CONTRACT TO KEEP PREMISES IN REPAIR—LESSOR  
AGAINST LESSEE.

Plaintiff states:—

1. That on the day of 18 , by a lease in writing, the plaintiff leased to the defendant, and the defendant rented from the plaintiff, for one year from said date, at a monthly rent of Rs. a certain dwelling-house in (describe the same), the property of plaintiff.

2. That by the said lease the defendant contracted with the plaintiff as follows: (copy the words of the contract) [or contracted with the plaintiff to keep the said house and premises in good and substantial repair during the said term].

3. That the defendant entered upon the premises and occupied the same during the said term of one year under said agreement; but that he has failed to keep the said house and premises in good and substantial repair; but, on the contrary (state injuries to premises), and the house and premises otherwise injured by reason of the neglect of the defendant to keep them in good repair, to the damage of the plaintiff Rs.

**Liability of Tenant.**—No contract to repair is implied from the fact of the relation of landlord and tenant being created.\*

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\* *Standen v. Christmas*, 10 Q. B. 135; *Granger v. Collins*, 6 M. and W. 458.



**Measure of Damages.**—In a suit against a tenant for breach of his contract to keep the premises in repair, the measure of damages during the continuance of the lease is the diminution in value of the reversion;\* and this depends on the age, character, and state of the premises on the creation of the tenancy.†

Form No. 209.

THE SAME—LESSEE AGAINST LESSOR.

Plaintiff states:—

1. and 2. (Allege as in preceding form.)
3. That the plaintiff entered into possession of said premises under said lease, and used the same as a warehouse for storing various articles of merchandise.
4. That the defendant has failed to keep the premises in repair, and has allowed (state neglect and special damage caused thereby), to the damage of the plaintiff Rs.

Form No. 210.

QUIET ENJOYMENT.

Plaintiff states:—

1. That by an instrument in writing, dated the      day of 18      , the defendant let to the plaintiff, and the plaintiff rented from the defendant, the house No.      in      street      for the term of three years, and thereby contracted with plaintiff that he should quietly enjoy possession thereof for the said term.
2. That on the      day of      18      , one A B, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.
3. That the plaintiff was thereby prevented from continuing the business of      at the said place, and was compelled to expend Rs.      in moving, and lost the custom of C, D, E, F, G, and H, and divers other persons, by such removal.

\* *Turner v. Lamb*, 14 M. and W. 412; *Doe v. Rowlands*, 9 C. and P. 734; *Smith v. Peat*, 9 Ex. 161; *Mills v. East London Union*, L. R., 8 C. P. 79; 43 L. J., C. P., 46; *Williams v. Williams*, L. R., 9 C. P. 659.

† *Payne v. Haine*, 16 M. and W. 541; *Stanley v. Towgood*, 3 Bing N. C. 4; *Bindell v. Withers*, 7 A. and E. 136.

**Measure of Damages.**—In a suit on the promise for quiet enjoyment the measure of damages is the loss directly sustained through the invalidity of the lease, as the expense of the void lease, and, when a valid lease has been obtained, the difference in value of the void and valid lease.\*

## CHAPTER VIII. ON OTHER CONTRACTS.

### Form No. 211.

#### BY A CONTRACTOR ON MODIFIED CONTRACT.

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant made a contract in writing with the plaintiff, of which the following is a copy (here copy contract).

2. That he has duly performed all the conditions thereof on his part, except that, at the request of the defendant, he finished the building with hard finish, instead of cloth and paper, for which the defendant promised to pay a reasonable sum in addition to the price named in the contract.

3. That by the consent of the defendant the time for completing said work was extended for one month beyond the time fixed by the contract, to wit, to the      day of      18      .

4. That the plaintiff on his part duly performed all the conditions of said contract as modified.

5. That the sum of Rs.      is a reasonable payment to be made in addition to the price named in said contract for finishing the building with hard finish instead of cloth and paper.

6. That on the      day of      , 18      , at      , plaintiff demanded of the defendant payment of the sum of Rs.      , the amount due on said contract as modified.

7. That he has not paid the same.

**Limitation.**—In suits for compensation for breach of contract, express or implied, not in writing registered, and specially provided for, three years from the time when the contract is broken, or (where there are successive breaches) when the

\* *Lock v. Furze*, 19 C. B. N. S. 26; 34 L. J., C. P., 201; 35 L. J., C. P., 141; L. R., 1 C. P. 441;

breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.\* In suits for compensation for the breach of a contract in writing registered, six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.†

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**Form. No. 212.**

**AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.**

**Plaintiff states:—**

1. That on the      day of      18      , at      , the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed (or state the tenor of the agreement).

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That the defendant built (or repaired) (the house) referred to in a bad and unworkmanlike manner (specify wherein the work was not properly done).

4. That in consequence of the defendant's breach of contract plaintiff had to incur an expense of Rs.      (in putting the said roof into proper condition).

**Measure of Damages.**—In a contract to repair a house, if the repairs are not completed according to contract, the builder is bound to pay the cost of making the repairs conform to the contract.‡

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**Form. No. 213.**

**AGAINST A BUILDER FOR NOT COMPLETING WITH SPECIAL  
DAMAGE FOR LOSS OF RENT.**

**Plaintiff states:—**

1. That on the      day of      18      , at      , the plaintiff and defendant entered into a contract in writing, of which a copy is annexed as a part of this plaint, marked Exhibit A.

2. That the plaintiff duly performed all the conditions thereof on his part.

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\* Art. 115, Limitation Act, 1877.

† Art. 116, Limitation Act, 1877.

‡ See Contract Act, 1872, s. 73, ill. f.

3. That the defendant entered upon the performance of the work under said contract, but has neglected to finish the same (state what he has neglected), and although the time for the completion of said building expired before the commencement of this suit, he neglects and refuses to complete the same.

4. That the plaintiff, on the       day of       18       , made an agreement with one A B, whereby he agreed to let, and the said A B agreed to hire, the said building for       months from the       day of 18       , to the       day of       18       , at the monthly rent of Rs.       , of which the defendant had notice.

5. That by reason of defendant's failure to complete the contract aforesaid on his part the plaintiff has been unable to give said A B occupancy thereof, and has been thereby deprived of the profits of said lease, to his damage Rs.       .

**Measure of Damages.**—In a suit against a builder for not completing the building of a house by a time agreed upon, the measure of damages is the cost of finishing the building according to contract, for rent lost, and for any compensation made to a lessee for not being able to give possession.\*

#### Form No. 214.

#### ON A CONTRACT TO MAKE A PROPELLER SHAFT—CLAIMING SPECIAL DAMAGE.

Plaintiff states:—

1. That on the       day of       18       , at       , plaintiff and defendant mutually agreed that the defendant should make and deliver to the plaintiff on the       day of       18       , at the New Dock, a new brass liner to the propeller shaft of the S.S. *Asia*, and a new brass stern bust for the same, both to be of the best quality and workmanship, and that plaintiff should pay the defendant Rs.       for the same.

2. That, before making said agreement, the defendant had notice that the plaintiff had contracted with the owners of the said ship to repair and refit the said ship by the       day of       18       , and that, if the defendant should not perform his said contract, the plaintiff would be unable to perform his contract with the said owners, and would be liable to pay to them damages.

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\* See Contract Act, 1872, s. 73, ill. 1.

3. That the new brass liner and new brass stern bust delivered by the defendant were of bad quality and workmanship, and unfit for use.

4. That the plaintiff was thereby prevented from performing his said contract with the said owners, and in a suit brought by them against him he was compelled to pay them Rs. damages and Ra. for costs.

5. That the following are the particulars of plaintiff's claim :—

	Rs.	As.	P.
Damages paid to the owner ... ..	1,000	0	0
Paid their costs as taxed ... ..	200	0	0
Plaintiff's costs of defending the suit brought by the owners	150	0	0
<b>TOTAL, Rs. ...</b>	<b>1,350</b>	<b>0</b>	<b>0</b>

### Form No. 215.

#### BREACH OF CONTRACT TO BUILD AND DELIVER A SHIP.

Plaintiff states :—

1. That by a contract in writing, hereunto annexed, and marked A, dated the day of 18 , it was agreed between the plaintiff and the defendant that the defendant should make and deliver to the plaintiff, at , on the day of 18 , a screw steamship of tons burden, at the price of Rs. .

2. That the defendant did not make and deliver such a ship, or any ship at all.

3. That in consequence of defendant's breach of contract plaintiff was compelled to purchase a similar ship from one A B at the price of Rs. , and was also compelled to charter a similar ship in order to carry on his business from the day of 18 , to the day of 18 , when the said A B delivered his ship.

4. That plaintiff paid Rs. for specifications and models of ship to be built and delivered by the defendant.

Particulars of damage :—

	Rs.	As.	P.
Increased price paid to A B for a similar ship ...	9,900	0	0
Paid for use of similar ship from day of 18 , until day of 18 , when A B delivered his ship ... ..	1,000	0	0
Paid for specifications and models for ship to be built and delivered by the defendant ... ..	300	0	0
<b>TOTAL Rs. ...</b>	<b>10,300</b>	<b>0</b>	<b>0</b>

**Measure of Damages.**—It has been held in England that where a ship is ordered to be made, or is left for repair, and not delivered at the agreed time, the measure of damage is *prima facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered.\*

Form No. 216

BREACH OF CONTRACT TO CONTRIBUTE TOWARDS THE EXPENSE  
OF FLOATING A COMPANY.

Plaintiffs state:—

1. That by a contract in writing hereunto attached, and marked A, dated the       day of       18       , made between the plaintiffs and the defendant, the defendant agreed, in consideration of the allotment of       shares to him, to contribute any sum not exceeding Rs. 1,000 which might be required as his share equally with each of the plaintiffs towards the expenses of floating the       Company, Limited.

2. That the Company was floated, and the defendant's share of the said expenses was Rs.       .

3. That the shares have been allotted to him.

Wherefore plaintiff pays for decree for Rs.       , and interest thereon from the       day of       18       , and the costs of suit.

Form No. 217.

AGAINST PURCHASER OF GOOD-WILL, ON A CONTRACT NOT TO  
CARRY ON RIVAL TRADE.

Plaintiff states:—

1. That heretofore the defendant carried on the business of       , at       , and on or about the       day of       18       , in consideration that the plaintiff would purchase from him his shop and godowns and the goods therein for the sum of Rs.       , and the good-will of the said business for the sum of Rs.       , the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly, set up or carry on the business of a       at       , or at any other place within       .

\* Fletcher v. Tayleur, 17 C. B. 21; L. J., 25 C. P. 65; Cory v. Thames Ironworks Co., L. R., 3 Q. B. 181.

2. That the plaintiff accordingly purchased from the defendant his said shop, godowns, and goods, and the good-will of the said business for the price and at the terms aforesaid, and paid the sum of Rs. for the same.

3. That the plaintiff duly performed all the conditions of said agreement on his part.

4. That the defendant afterwards, to wit, on the       day of 18       , set up and carried on the business of       , at       .

**Good-will Defined.**—This term is usually used to denote the benefit arising from connection and reputation ; and its value is what can be got for the chance of being able to keep that connection and improve it.\*

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Form No. 218

FOR NOT MANUFACTURING RAW MATERIAL INTO  
MERCHANTABLE GOODS.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff delivered to the defendant one hundred hides of leather, of the value of Rs.       , to be manufactured into harness, for a reasonable compensation, to be paid to the defendant by the plaintiff.

2. That the defendant, in consideration thereof, undertook to manufacture the said harness, or cause it to be manufactured, from the leather, and to deliver the same to the plaintiff when so manufactured.

3. That the defendant did not manufacture said leather into harness, although a reasonable time therefor elapsed before this suit (or that the said leather was so manufactured into harness by the defendant before the       day of       18       , on which day the plaintiff demanded the same of the defendant, and then and there offered to pay him a reasonable compensation for manufacturing the same, but the defendant, then and ever since, refused and neglected to deliver the same, and has converted them to his own use).

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\* Lindley, 3rd ed. 884 ; Arundell v. Bell, W. N. 1883, 27.

Form No. 218.

AGAINST TELEGRAPH COMPANY FOR FAILURE TO TRANSMIT  
MESSAGE AS DIRECTED.

Plaintiff states:—

1. That the defendants are, and at all the times hereinafter mentioned were, engaged in the business of telegraphing for hire.

2. That on the        day of        18       , the plaintiff presented to the defendant, at its office in       , the following message, to wit:—  
“John Doe, Calcutta. Buy one hundred tons of rice. James Roe (the plaintiff),” which message the defendant received and promised to forward by telegraph to said John Doe in Calcutta; and in consideration thereof the plaintiff paid the defendant Rs.       .

3. That, on account of the negligence of the defendant, said message was not transmitted as written by plaintiff, but was sent and delivered to said John Doe so as to read as follows: “John Doe, Calcutta. Buy five hundred tons of rice. James Roe.”

4. That said John Doe, in pursuance of said message so delivered to him, bought five hundred tons of rice on account of the plaintiff; that immediately on learning the error in said telegram, plaintiff notified the defendant of the same, and that through said error four hundred tons of rice had been bought more than was directed to be bought by the original message written by the plaintiff; and plaintiff asked instructions from defendant relative to the disposition of said four hundred tons; that defendant refused to take any notice thereof, or give any instructions concerning said rice, and the plaintiff thereupon sold the same at Calcutta on the        day of       , 18       , at the highest market-rate.

5. That the price paid by the plaintiff for said rice was Rs.       , and plaintiff was compelled to pay the further sum of Rs.       , commission on said purchase; that plaintiff sold said rice for Rs.       , and was compelled to pay Rs.       , commission on said sale.

**Suit by Receiver of Message.**—The receiver of a telegraphic message cannot maintain an action against the company for a mistake in transmitting a message, whereby he has been damaged; because the obligation of the company to use due care and skill in the transmission of the message is one entirely arising out of the contract, and the contract is made with the sender of the message.\*

\* *Playford v. United Kingdom Telegraph Co.*, L. B., 4 Q. B. 706; *Dickson v. Reuter's Telegraph Co.*, 3 C. P. D. 1.



**THIRD DIVISION.**

**SUITS FOR COMPENSATION FOR WRONGS.**

**FIRST SUB-DIVISION.**

**INJURIES TO THE PERSON.**

**CHAPTER I.**

**ASSAULT AND BATTERY.**

**Form No. 220.**

**FOR ASSAULT AND BATTERY—SHORT FORM.**

Plaintiff states :—

That on the      day of      18      , at      , the defendant assaulted and beat him about the head and shoulders.

Wherefore plaintiff prays judgment for Rs.      , compensation.

**Form No. 221.**

**THE SAME—WITH SPECIAL DAMAGE.**

Plaintiff states :—

1. That on the      day of      , 18      . at      , the defendant assaulted the plaintiff, and struck him (state where) several blows, and also tore the clothes from the plaintiff's person.

2. That the plaintiff was thereby disabled from attending to his business for six weeks thereafter, and was compelled to pay Rs.      for medical attendance, and has ever since been disabled from using his right arm (or otherwise state the damage, as the case may be).

**Definitions.**—An assault is an attempt to do a corporal injury to another, coupled with a present ability, or any act or gesture, from which an intention to commit a battery may be implied.\* It is an offer to strike, beat, or commit an act of violence on the person of another without actually doing it, or touching his person, as striking at a person with the hand or a stick, or presenting a gun at him. Battery is the wilful and unlawful use of force or violence upon the person of another.

**Master and Servant.**—The master is liable for the servant, if he acts within the scope of his authority.

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\* *Read v. Cooker*, L. J., 22 C. P. 201.

**Measure of Damages.**—Where the assault is without provocation, the damages given should be commensurate to the injury and annoyance caused, even though there has been no serious personal injury sustained.\*

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**Form No. 222.**

**AGAINST A RAILWAY COMPANY FOR ASSAULT AND FORCIBLE  
EJECTION.**

Plaintiff states :—

1. That at the times hereinafter mentioned, the defendant was, and now is, a Railway Company, duly organized and existing under (state the Act or Charter), and was the owner of a certain railway known as the                      Railway, with the truck, carriages, and other appurtenances thereunto belonging, and was a common carrier of passengers from                      to                      .

2. That on the                      day of                      , at                      , the defendant, with unnecessary violence, assaulted the plaintiff, and forcibly ejected him from one of its carriages.

3. That the plaintiff was thereby injured in his arm, and much bruised about his chest and face, and was thereby rendered unfit for                      days to attend to his business of                      (state further special damage, if any).

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**Form No. 223.**

**ASSAULT AND FALSE IMPRISONMENT.**

Plaintiff states :—

1. That on the                      day of                      , 18                      , at                      , the defendant assaulted the plaintiff, and charged him with (state what offence), and gave him into custody of a policeman, and forced and compelled him to go to a police-station, and there caused him to be imprisoned, and caused him to be kept in prison for a long time, until he was afterwards brought in custody before the Magistrate of                      , and the defendant again charged him with the said offence ; but the said Magistrate dismissed the said charge, and discharged the plaintiff out of custody.

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\* *Ramjoy Muzoundari v. Dr. Russell*, W. E., 1864, 370.

2. That by reason thereof the plaintiff suffered great pain of body and mind and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment (or as the case may be).

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**CHAPTER II.**  
**FALSE IMPRISONMENT.**

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**Form No. 224.**

**COMMON FORM.**

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant imprisoned him for      days, without probable cause.  
(State special damage, if any.)

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**Form No. 225.**

**A FULLER FORM.**

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant, by force, compelled the plaintiff to go with him to the police-station, and there accused him of (state what offence), and gave him into the custody of a constable upon the said charge.

2. That plaintiff, upon being so given into custody, was there imprisoned and detained in a cell of the      police-station for      hours, without probable cause, and against the will of the plaintiff.

3. That thereafter plaintiff was taken in custody before the Magistrate of      , when the charge against him was heard, and dismissed.

4. That, in consequence thereof, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

**What amounts to an Imprisonment.**—There need not be an actual seizure of the person to constitute imprisonment; “if a person send for a constable, and give another in charge for felony, and the constable tells the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment;”<sup>\*</sup> but the restraint on liberty must be total. A partial restraint, as by preventing a person advancing along a particular pathway while allowing him to retire, is not enough.<sup>†</sup>

**Limitation.**—In a suit for compensation for false imprisonment, one year from the time when the imprisonment ends.<sup>‡</sup>

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## CHAPTER III.

### LIBEL AND SLANDER.

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#### Form No. 226.

#### LIBEL—THE WORDS BEING LIBELLOUS IN THEMSELVES.

**Plaintiff states:—**

1. That on the       day of       18       , at       , the defendant published in a newspaper, called the       (or in a letter addressed to E F), the following words concerning the plaintiff:—

[Set forth the words used, and if the libel was in a language not the language of the Court, set out the libel *verbatim* in the foreign language in which it was published, and then proceed thus: which said words, being translated into the       language, have the meaning and effect following, and were so understood by the persons to whom they were published, that is to say: (here set out a literal translation of the libel in the language of the Court).]

2. That the said publication was false and malicious.

3. That by means thereof plaintiff was injured in his credit and reputation.

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\* *Pocock v. Morse*, per Abbott, C.J., Ry. and Mo. 331.

† *Bird v. Jones*, 7 L. R., Q. B., 742-752.

‡ Art. 19, Limitation Act, 1877.

## Form. No. 227.

LIBEL—THE WORDS NOT BEING LIBELLOUS IN THEMSELVES.

Plaintiff states:—

1. That the plaintiff is, and was, on and before the      day of 18      , a merchant, doing business at
2. That on the      day of      18      , at      , the defendant published in a newspaper, called the      (or in a letter addressed to E F), the following words concerning the plaintiff:—

“A B, of this city, has modestly retired to foreign lands. It is said that creditors to the amount of Rs.      are anxiously seeking his address.”

3. That the defendant meant thereby that the plaintiff had absconded to avoid his creditors, and with intent to defraud them.

4. That the said publication was false and malicious.

**Definitions.**—Libel consists in the publication by the defendant, by means of printing, writing, pictures, or the like signs, of matter defamatory to the plaintiff: slander consists in the publication by the defendant, by means of words spoken; of matter defamatory to the plaintiff.

Every communication of language from one person to another is a publication; but to make it actionable it is essential that there be a publication to a third person.\*

**Who may Sue.**—A suit for defamation can only be brought by the person who has been defamed. The fact that the defamatory statement has caused injury to other persons, does not entitle them to sue; and therefore a suit brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, but alleged to have caused damage to the plaintiff as a member of the same family, is not maintainable.†

**Necessary Averments.**—The plaint should state that the publication was false; from this malice will be presumed, unless the words are privileged.‡ But it is not necessary to allege that the words were published maliciously, as the malice is sufficiently implied from the falseness.§ But when the occasion is a privileged one, it is necessary to allege malice.

\* *Queen-Empress v. Taki Husain*, I. L. R., 7 All. 205.

† *Luokumsey Rowji v. Hurbun Nursey*, I. L. R., 5 Bom. 580.

‡ *Jacob Peter v. Dufour*, W. R., 1864, 92; *Bromage v. Prosser*, 4 B. and C. 247-255; *Haire v. Wilson*, 9 B. and C. 643; *Huntley v. Ward*, 6 C. B., N. S., 514; *Davies v. Sneed*, L. R., 5 Q. B. 608-611; 39 L. J., Q. B., 202; *Toogood v. Spryng*, 1 C. M. and E. 193; *Hamon v. Falte*, 4 App. Cas. 247-251.

§ *Bromage v. Prosser*, *supra*; *Mercer v. Molyneux*, 3 Q. B. D. 237, 247; 47 L. J., Q. B., 230.

When the libel or slander is in a foreign language, the plaintiff should aver that the persons to whom it was published understood the language.\*

The words alleged to be libelous must be fully set out in the plaint.†

**Privilege.**—"A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter which, without this privilege, would be slanderous and actionable."‡

A Judge is not liable for words spoken or written in office,§ nor is a pleader liable for defamatory words uttered in good faith,|| and in England Counsel are absolutely privileged.¶

A party to a suit cannot be held liable for defamatory expressions.\* In England, parties, witnesses, counsel, jury, and judge, are all alike privileged.††

Giving a document containing a resolution of a libellous character to clerks to copy, if it be a publication of the libel, is privileged.‡‡

When, during the pendency of a suit brought by the plaintiff against an absconding debtor, the defendants presented a petition containing libellous statements to the effect that the suit was for sums greatly in excess of the debt due, whereby petitioners were prejudiced, and the Judge found that there was no malice in fact, it was held that, as defendants were creditors of an absconded debtor, and deeply interested in seeing that his estate was not swept off in satisfaction of an excessive claim made by the earliest suitor, they in presenting a petition, pointing out what they considered suspicious elements in the plaintiff's claim against such debtor, were, at all events, entitled to the qualified privilege of persons acting in good faith, and making communications with a fair and reasonable purpose of protecting their own interests.§§ It has been held, however, that the law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code, and not the English law of libel and slander; and therefore defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding.|||

\* *Aman v. Damur*, 8 C. B., N. S., 597; 20 L. J., O. P., 313.

† *Wyman v. Banks*, 18 W. R. 516.

‡ *Harrison v. Bush*, per Lord Campbell, 5 E. and B. 344; *Hookford v. Gulstin*, Cor. Rep. 134; *Hyde's Rep.* 274.

§ *Seaman v. Netherolift*, 1 O. P. D. 540; 2 C. P. D. 53.

|| *Queen v. Chrestien*, 1 L. R., 2 All. 473.

¶ *Seaman v. Netherolift*, *supra*.

\*\* *Maharane Kummul v. Hedger*, 7 S. D. A. Sel. 33; *Chowdry Goor v. Dutt Singh*, 2 Agra H. C. R. 33.

†† *Jex v. Skinner*, 1 Lofft. 55.

‡‡ *Sheppard v. Trustees of the Port of Bombay*, 1 L. R., 1 Bom. 477.

§§ *Hinde v. Bandry*, 1 L. R., 2 Mad. 13.

||| *Abdul Hakim v. Tej Chandar Mukarji*, 1 L. R., 3 All. 815.

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**Damages.**—The Court is not bound, as a matter of law, to give damages for defamation, after defendant has already been convicted and fined for the offence in the Criminal Court, when plaintiff has suffered no actual damages.\*

**Limitation.**—In suits for compensation for libel, one year from the time when the libel is published.†

### Form No. 228.

BY AN ATTORNEY.

Plaintiff states:—

1. That the plaintiff was, on and before the       day of  
18       , an attorney-at-law of the several Courts of       , duly admitted as such to practise therein as such attorney, and had practised, and still continued to practise, as such attorney-at-law, in the several Courts of       , and had always, as such attorney-at-law, conducted and demeaned himself with honesty and fidelity, and had never been guilty, or suspected to have been guilty, of any misconduct or malpractice in his said capacity and profession of an attorney-at-law.

2. That on the       day of       18       , at       , the defendant published in a newspaper, called the       , the following words concerning the plaintiff in his said capacity and profession of an attorney-at-law. (Set forth the words used.)

3. That the defendant meant thereby that (state innuendo).

4. That the publication was false and malicious; and by means thereof the plaintiff hath been and is greatly injured and prejudiced in his reputation aforesaid, and has also lost, and been deprived of, great gains and profits, which would otherwise have accrued to him in his said profession and business.

**Necessary Averments.**—When the words impute misconduct, or want of qualification or skill, in a profession or business, the plaint should state that the words were spoken or written in relation to such profession or business.‡

**Innuendo.**—When the words used are innocent, or uncertain, in their natural meaning, or are used ironically, the plaint should set out the innuendo,§ but the office of an innuendo is to explain, not to extend, what has gone before, and it

\* *Futuk Parovee v. Mohender Nath*, 1 L. R., 1 Cal. 385.

† Art. 24, Limitation Act, 1877.

‡ *Miller v. David*, L. R., 9 C. P. 118; 43 L. J., C. P., 84.

§ *Sweetapple v. Jesse*, 5 B. and Ad. 27; *Jackson v. Adams*, 2 Bing N. C. 408; *Cox v. Cooper*, 12 W. R. 75.

cannot enlarge the meaning of words, nor change the ordinary meaning of language ; and it has been held that if the words do not appear to the Court to be libellous, the plaintiff cannot make them so by alleging that the words were spoken ironically.\*

**When Cause of Action Arises.**—In libel the cause of action arises on the publication of the libel, but in slander when the damage is sustained, and not on the uttering of the slander, except in the cases when actual damage need not be proved.

**Distinction between Libel and Slander.**—A suit for libel may be maintained without proof of damage caused to the plaintiff thereby ; but in order to maintain a suit for slander, the plaintiff must prove that he has sustained actual damage by reason of the slander, except where the slander consists in the imputation of crime, or disease causing unfitness for society, or incompetency, or misconduct in business.

**Damage.**—When the words are not actionable in themselves, it is necessary to state the special damage in the plaint ; but where the words are actionable in themselves, this is not necessary, unless special damage is claimed in addition to the general damages.

**Ambiguous Words.**—When words are ambiguous, or uncertain in their meaning, the plaintiff must allege such circumstances as will show that they were uttered with a slanderous meaning.

### Form No. 229.

#### BY A PHYSICIAN.

Plaintiff states :—

1. That at the time hereinafter mentioned the plaintiff was a physician, practising as such at
2. That on the      day of      18      , at      , the defendant published in a newspaper, called the      , the following words concerning the plaintiff (set forth the words used).
3. That said publication was false and malicious, and by means thereof the plaintiff was injured in his reputation, and in his good name and credit as a physician, and the following persons (set out their names and addresses) have in consequence ceased to employ the plaintiff in the way of his profession.

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\* Wyman v. Banks, 18 W. R. 516.



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**Form No. 230.**

**FOR LIBEL BY SIGNS.**

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant, contriving to injure the plaintiff in his reputation, and to bring him into public contempt, disgrace, and ridicule, did, in the public street of      , wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, and hung up, and caused to be hung up, the said effigy, in the view of the neighbours of the plaintiff and of the public then and there assembled, by means of which the plaintiff has been greatly injured in his reputation.

**Libel by Means of an Effigy.**—A suit will lie for damages for exhibiting an effigy.\*

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**Form No. 231.**

**SLANDER—THE WORDS BEING ACTIONABLE IN THEMSELVES.**

Plaintiff states:—

1. That on the      day of      18      , at      , the defendant falsely and maliciously spoke, in the hearing of E F (or sundry persons), the following words concerning the plaintiff: "He is a thief."

2. That, in consequence of the said words, the plaintiff lost his situation as      in the employ of      .

**Abuse.**—An action will lie for damages on account of abuse received, even though plaintiff's professional position and gains are not injured thereby.†

**Limitation.**—In suits for compensation for slander, the words being actionable in themselves, one year from the time when the words are spoken.‡

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\* *Petumber Dass v. Dwarka Pershad*, I. L. R., 2 All. 435.

† *Gour Chunder v. Caly*, 8 W. R. 256; *Moulvi Gholam Hossen v. Hur Govind Dass*, 1 W. R. 19; *Shaikh Tuckee v. Shaikh Khosbdel*, 6 W. R. 151; *Kali Kumar v. Ramgati*, 6 B. L. R. App. 99; *Sreenath Mokerjee v. Komul Karmokar*, 16 W. R. 83; *Kashiram v. Bhadu*, I. L. R., 7 Bom. 17; but see *Srikant Roy v. Satowrie*, 3 C. L. R. 191.

‡ Art. 25, Limitation Act, 1877.

## Form No. 232.

## SLANDER—THE WORDS NOT BEING ACTIONABLE IN THEMSELVES.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant, falsely and maliciously, said to one E F concerning the plaintiff: "He is a young man of remarkably easy conscience."

2. That the plaintiff was then seeking employment as a clerk, and the defendant meant, by the said words, that the plaintiff was not trustworthy as a clerk.

3. That in consequence of the said words the said E F refused to employ the plaintiff as a clerk.

**Limitation.**—In suits for compensation for slander, the words not being actionable in themselves, one year from the time when the special damage complained of results.\*

## Form No. 233.

## SLANDER RESPECTING PLAINTIFF'S TRADE.

Plaintiff states:—

1. That at the time hereinafter mentioned the plaintiff was engaged in business as a merchant, and had always maintained a good reputation and credit as such merchant.

2. That on the       day of       18       , at       , the defendant, in the presence and hearing of a number of persons, falsely and maliciously, and with intent to cause it to be believed that the plaintiff kept false and fraudulent books of account in his said business, published the following words concerning this plaintiff, and concerning his said business: "He keeps false accounts."

3. That, in consequence of said words, a number of persons, and in particular (name the persons referred to), who had theretofore been accustomed to deal with the plaintiff in his business aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom, and of the profits which he would otherwise have made by a continuance of such dealing, and was otherwise injured in his reputation.

**Names of Customers Lost.**—The names of persons who have ceased to deal with the plaintiff should be stated; but if this is impracticable, he may prove a general loss of business.

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\* Art. 25, Limitation Act, 1877.

**Form No. 234.**

**SLANDER—RELYING ON SPECIAL DAMAGE.**

Plaintiff states:—

1. That in the month of     18     , the plaintiff was a candidate for admission to membership in the     club.
2. That on the 2nd of said month the defendant falsely and maliciously spoke the following words concerning the plaintiff (set out the words), meaning thereby that the plaintiff had been guilty of ungentlemanly and dishonourable conduct, and that he was not a fit person to associate in any society of gentlemen, or to be a member of the     club.
3. That in consequence of the publication of the said words,     , and     , and other persons, were deterred from voting for the repeal of one of the rules of the said     club, which prevented the plaintiff being ballotted for as a candidate for the said     club.

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**Form No. 235.**

**SLANDER—CHARGING A CRIMINAL OFFENCE.**

Plaintiff states:—

1. That at the time hereinafter mentioned the plaintiff sustained a good name and character among his neighbours and acquaintances for moral worth and integrity, and was never suspected of the crime of forgery.
  2. That on the     day of     18     , at     , the defendant, in the presence and hearing of a number of persons, falsely and maliciously spoke the following words concerning the plaintiff: "He is a forger."
  3. That, in consequence thereof, the plaintiff has been greatly injured in his good name and reputation.
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# CHAPTER IV. MALICIOUS PROSECUTION.

Form No. 236.

COMMON FORM.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant obtained a warrant from       , a Magistrate of said city, on a charge of       , and the plaintiff was arrested thereon, and imprisoned for       hours, and gave bail in the sum of Rs.       to obtain his release.

2. That in doing so the defendant acted maliciously and without reasonable or probable cause.

3. That on the       day of       18       , the said Magistrate dismissed the complaint of the defendant, and acquitted the plaintiff.

4. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the defendant to be a criminal, have ceased to do business with him (or that in consequence of the said arrest the plaintiff lost his situation as clerk to one E F, or that by reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expenses in obtaining his release from said imprisonment, and in defending himself against the said complaint.

**Necessary Averments.**—The plaint should show, 1st, that a criminal charge was made before a judicial officer by the defendant; 2ndly, that the charge was false, and was so determined by the Court which tried the case, or by the Court of Appeal; 3rdly, that the defendant acted maliciously; 4thly, that the prosecution was without reasonable or probable cause; and, 5thly, that the plaintiff has suffered injury to his property, person, or reputation.\*

**Malice Inferred.**—Malice may be inferred from the absence of reasonable and probable cause,† but the reverse does not hold good, and malice alone is not sufficient, as “a person actuated by the plainest malice may nevertheless have a justifiable reason for a prosecution.”‡

\* See *Baboo Ram v. Sirdar Dyal Singh*, 17 W. R. 101.

† *Gunga Pershad v. Ramphul Sahoo*, 20 W. R. 177; *Vengama Naikar v. Raghava Chary*, 2 Mad. H. C. Rep. 291.

‡ *Williams v. Taylor*, per Tindal, C.J., 6 Bing. 188; *Turner v. Ambler*, 10 Q. B. 252.

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**Onus Probandi.**—The onus of proving all the issues in this case lies on the plaintiff.\*

**Corporations.**—This action may be brought against a corporation.†

**Measure of Damages.**—In a suit for damages for malicious prosecution the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge,‡ including the fee paid to his advocate for the purpose of his defence;§ and the Court, in estimating damages, may take into consideration the plaintiff's feelings.||

**Civil Suits.**—No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a Civil Court.¶

In England it has been held that an action will lie for maliciously and without reasonable or probable cause presenting a winding-up petition against a trading company.\*\*

**Limitation.**—In suits for compensation for malicious prosecution, one year from the time when the plaintiff is acquitted, or the prosecution is otherwise terminated.††

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### Form No. 237.

#### A FULLER FORM.

Plaintiff states:—

1. That at the time of the grievances hereinafter mentioned the plaintiff was in the service of the defendant as his clerk.

2. That on the       day of       18       , the defendant, falsely and maliciously, and without any reasonable or probable cause, appeared before       , a Magistrate of       , and charged the plaintiff with having stolen       , and upon such charge procured the said Magistrate to grant his warrant for the arrest of the plaintiff.

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\* *Abrath v. North-Eastern Ry. Co.*, 11 Q. B. D. 440.

† *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287.

‡ *Bunnomalli Nundi v. Hurry Dass Byraji*, I. L. R., 8 Cal. 710.

§ *Subba Ram v. Verappa*, I. L. R., 5 Mad. 162.

|| *Huro Lall v. Huro Chunder*, 12 W. R. 89.

¶ *Pranshankar Shivshankar v. Goomdhal Parbhudas*, I. L. R., 1 Bom. 467; *Chander Kant v. Ram Coommar*, 22 W. R. 188; *Ram Coommar v. Chunder Kanto Mookerjee*, I. L. R., 2 Cal. 238.

\*\* *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, 11 Q. B. D. 674.

†† Art. 23, Limitation Act, 1877.

3. That said Magistrate issued his warrant accordingly, and the plaintiff was arrested and imprisoned under the same for        days (or hours), and gave bail in the sum of        to obtain his release.

4. That on the        day of        18       , plaintiff was brought in custody before the said Magistrate, when the defendant procured the said Justice to remand the plaintiff to prison, and caused the plaintiff to be imprisoned until the        day of        18       , and then again brought in custody before the said Magistrate.

5. That on the        day of        18       , the said Magistrate, having heard the said charge, dismissed the same, and discharged the plaintiff out of custody, whereby the said prosecution was determined.

6. That the said charge and the arrest of the plaintiff thereunder were extensively published in several newspapers, among others the       , as the plaintiff believes, through the procurement of the defendant.

7. That by reason of the premises the plaintiff was injured in his person, and prevented from attending to his business, and was injured in his good name and reputation, and was put to an expense of Rs.        in obtaining his release from the said imprisonment.

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Form No. 238.

FOR MALICIOUS ARREST IN A CIVIL SUIT.

Plaintiff states :—

1. That on the        day of        18       , the now defendant instituted a suit against the now plaintiff in the Court of        to recover Rs.       , alleged to be due to him for (state what).

2. That after the commencement of the said suit, the defendant falsely and maliciously, and without reasonable or probable cause, made affidavit, and procured one A B to make an affidavit in said suit, in which he alleged (set forth the grounds of the false arrest); and upon said affidavits the defendant caused to be issued an order of arrest against this plaintiff, under which the plaintiff was arrested and imprisoned for the space of       , and compelled to give security in the sum of Rs.       .

3. That on the       day of       18       , said order was vacated by said Court, upon the grounds that (set forth the grounds on which it was vacated).

(Or, That on the       day of       18       , such proceedings were had in such suit; that it was finally determined in favour of this plaintiff, and judgment was rendered for him therein).

4. (State damage.)

**When Suit Lies.**—In a suit for damages on account of injuries caused by an arrest under a decree of a competent Court, plaintiff must show (1) that the original suit, out of which the alleged injury arose, was decided in his favour; (2) that the arrest was procured maliciously, and without reasonable and probable cause; (3) that the injury or damage sustained was something other than an injury which has been, or might have been, compensated for by an award of costs of the suit, *e.g.*, that he has suffered some "collateral wrong."<sup>e</sup>

## CHAPTER V.

### PERSONAL INJURY CAUSED BY NEGLIGENCE.

#### Form No. 239.

#### FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

Plaintiff states:—

1. That the plaintiff is a shoemaker carrying on business at       , and the defendant is a merchant of       .

2. That on the       day of       18       , the plaintiff was walking eastward along Chowringhee, in the city of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Harrington Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant's, drawn by two horses, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning turned at a rapid and dangerous pace out of Harrington Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

<sup>e</sup> *Raj Chunder Roy v. Shama Sundari*, I. L. R., 4 Cal. 588.

3. That by the blow, and fall, and trampling, the plaintiff's arm was broken, and he was bruised and injured on the side and back, as well as internally; and, in consequence thereof, the plaintiff was for four months ill, and is suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

**Liability of Master for Acts of Servant.**—The master is liable for the negligence of his servant committed in the course of his employment,\* but not for his wilful and malicious acts.† A principal is answerable for the acts of his agent in the course of his master's business, and for his master's benefit, and for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit. Though the master may not have authorized the act, if he has put the agent in his place to do a particular class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.‡

Where the arrangement between the proprietor of a buggy and the driver was that the driver should be entrusted with the buggy and the use of two horses a day, to be used entirely at the driver's discretion, for the purpose of plying for hire; and the driver was to pay three rupees a day for the use of the buggy and horses; and all he made above that sum was his perquisite for his labour, and any deficiency he had to make good; it was held that the relation between the proprietor and the driver of the buggy was that of master and servant, and that the proprietor was liable for the driver's negligence.§

**Liability of Master to Servant.**—Though not liable to a servant for the negligence of a fellow-servant engaged in the same employment,|| the master is yet liable to him for his own personal negligence, and that of one who is his vice-principal or representative.¶

**When Suit Lies.**—The injury must be the direct result of the negligence.\*\*

**Executors and Administrators.**—All rights of action for wrongs survive to and against the executor and administrator of a deceased person, except suits for

\* *Croft v. Alison*, 4 B. & A. 590; and see *Storey v. Ashton*, L. R., 4 Q. B. 476.

† *M'Manus v. Crickot*, 1 East. 106.

‡ *Bombay-Barmah Trading Co. v. Mirza Mahomed Ally*, L. R., 5 I. A. 130; I. L. R., 4 Cal. 116.

§ I. L. R., 7 Bom. 119.

|| *Friestley v. Fowle*, 3 M. & W. 1.

¶ *Murphey v. Smith*, 19 C. B., N. S. 361; see also *Mallows v. Shaw*, L. J., 30 Q. B. 333; *Tarrant v. Webb*, 18 C. B. 787; L. J., 25 C. P. 261; *Roberts v. Smith*, 2 H. & N. 213; *Watling v. Oastler*, L. J., 6 Ex. 78.

\*\* *Jackson v. Metropolitan Railway Co.*, 3 App. Cas. 193; 37 L. J., N. S., 670, per Lord Cairns.



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defamation and for injuries to the person not causing death;\* and when death is caused by the wrongful act, the representative may sue under Act XIII. of 1855. As to the measure of damages in such cases, see the cases cited below.†

**Small Cause Courts.**—Suits for damages for personal injury cannot be brought in a Mofussil Small Cause Court unless actual pecuniary damage has resulted from the injury.‡

**Limitation.**—In suits by an executor or administrator, or representative under Act XIII. of 1855, one year from the date of the person killed.§

In suits under Act XII. of 1855, one year from the date of the death of the person wronged.||

In suits for injury to the person, one year from the time when the injury is committed.¶

### Form No. 240.

#### AGAINST A RAILWAY.

Plaintiff states :—

1. That the plaintiff is a merchant, residing at \_\_\_\_\_, and the defendants are a company possessed of a railway, known as the \_\_\_\_\_

Railway; and were common carriers of passengers thereupon between \_\_\_\_\_ and \_\_\_\_\_.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the plaintiff was a passenger in one of the carriages of the defendants on said railway.

3. That while he was such passenger at \_\_\_\_\_ (or near the station of \_\_\_\_\_, or between the stations of \_\_\_\_\_ and \_\_\_\_\_), a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured, having his leg broken, his head cut (and state the special damage, if any, as \_\_\_\_\_), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business of a merchant.

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\* Succession Act, 1865, s. 268; and Act XII. of 1855; and Probate & Administration Act, 1881, s. 89.

† Vinayak v. G. I. P. Ry. Co., 7 Bom., O. C. J., 113; and Ratambi v. G. I. P. Ry. Co., 7 Bom., O. C. J., 120; 7 Bom., O. C. J., 130.

‡ Durga Pershad v. Asa Jolaha, I. L. R., 5 Cal. 325.

§ Art. 21, Limitation Act, 1877.

|| Art. 20, Limitation Act, 1877.

¶ Art. 22, Limitation Act, 1877.

(Or 3. That on that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, &c.)

(Or 3. That the defendants and their servants, in managing said carriage in which plaintiff was a passenger, were so careless and negligent that it was unsafe for him to remain in it; and that, in order to free himself from the danger, he was obliged to leap from the carriage, and, in doing so, was injured, &c.)

(Or 3. That while he was such passenger at , the defendants by their servants so negligently and unskilfully conducted the running of said carriage that the said carriage was run off the track of said railway, and thrown down the embankment thereof, whereby the plaintiff was greatly cut, bruised, and wounded, &c.)

**Liability of Carriers of Passengers.**—Carriers of passengers are not liable as insurers, but they are bound to take due care in the conveyance of passengers;\* they are not liable for injuries caused by defects impossible of detection,† but they are liable if the defect could, by the exercise of care and skill, be discovered or avoided.‡

**When Suit Lies.**—It is immaterial whether the passenger bought his own ticket, or whether another person took and paid for it.§

**Measure of Damages.**—In a suit by a passenger for injuries, the Court, in assessing damages, will take into consideration the pain and personal suffering of the plaintiff, the expense incurred by him for medical and other necessities, treatment, and attendance, and the business-loss he has sustained, and is likely to sustain, through inability to continue to attend to his business.||

\* *Readhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412; L. R., 4 Q. B. 379-383; 36 L. J., Q. B., 181; 38 L. J., Q. B., 169; *Daniel v. Metropolitan Ry. Co.*, L. R., 5 H. L., 45-55; 40 L. J., C. P., 121.

† *Readhead v. Midland Ry. Co.*, *supra*.

‡ *Francis v. Cockerell*, L. R., 5 Q. B. 184-194; L. R., 5 Q. B. 501-513; 39 L. J., Q. B., 113; 39 L. J., Q. B., 291.

§ *Marshall v. York, N. & B. Ry. Co.*, 11 C. B. 655; 31 L. J., C. P., 24; *Martin v. G. J. P. Ry. Co.*, L. R., 3 Ex. 9.

|| *Phillips v. L. & S. W. Ry. Co.*, 5 C. P. D. 280; 40 L. J., C. P., 233; *Fair v. L. & N. W. Ry. Co.*, 21 L. T. 326.

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### Form No. 241.

#### AGAINST RAILWAY.—FOR NEGLIGENTLY STARTING TRAIN.

Plaintiff states :—

1 and 2. (As in form No. 240.)

3. That while plaintiff was such passenger, and at the station of said railway, when in the act of getting out of, and off from, said carriage, and being still thereon, to wit, on the platform thereof, the said carriage was, through the neglect of the servants of the defendants, suddenly started and put in motion, without allowing said plaintiff sufficient time to safely get off, and in consequence thereof, and in consequence of the defect and insufficiency of said company's said platform, and of the coupling connecting said carriage with the other carriages of the train, and of the defective and insufficient guards around said platform and across the passage-way leading therefrom to the next adjacent car, and in further consequence of the insufficient and imperfect means provided for giving the alarm preparatory to starting said train, and of the negligence and carelessness of the servants of the defendants in the running and conducting of said train, the plaintiff was violently thrown on the track between the carriages, and sustained great injury, to wit, one of his feet was crushed by a wheel of one of said carriages passing over it, so that its immediate amputation became necessary, and it was accordingly amputated.

4. That in the act of getting off from said carriage, as aforesaid, the plaintiff exercised and observed all due and proper care and precaution.

5. (Allegation of any special damage.)

### Form No. 242.

#### AGAINST RAILWAY.—FOR NEGLIGENCE IN OMITTING TO GIVE SIGNAL.

Plaintiff states :—

1. That he is a \_\_\_\_\_, residing at \_\_\_\_\_, and the defendants are a company, possessing a railway, known as the \_\_\_\_\_ Railway, together with the track, rolling-stock, and other appurtenances thereto belonging.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the plaintiff was travelling in a carriage along the public highway from \_\_\_\_\_ to \_\_\_\_\_, which public highway crosses the railway aforesaid at \_\_\_\_\_, and as

the plaintiff had reached said crossing, the defendants carelessly and negligently caused one of their locomotives, with a train of carriages attached thereto, to approach said crossing, and to pass rapidly over the track of said railway, and negligently and carelessly omitted their duty, while approaching said crossing, to give any signal by ringing the bell, or sounding the steam-whistle, by reason whereof the plaintiff was unaware of their approach.

3. That in consequence thereof the locomotive struck the plaintiff's horse, and upset the plaintiff's carriage, and plaintiff was thrown out upon the ground with such force as to fracture his left arm, &c.

4. That thereby plaintiff was put to great pain, and was, and still is, prevented from going on with his business as , and is, as he believes, permanently injured, and was otherwise greatly injured, and was compelled to expend Rs. for medical attendance and nursing.

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Form No. 243.

AGAINST MUNICIPALITY FOR INJURIES CAUSED BY LEAVING STREET  
IN INSECURE STATE,

Plaintiff states :—

1. That the defendants are a municipal corporation, organized and existing under the (state the Act).

2. That it is their duty to keep the streets of the town of in good order, and at all times properly to protect any excavations made in said streets, by placing lights and signals thereat to indicate the danger.

3. That a certain street in said town, known as , was and is a common thoroughfare, used by the residents thereof and others ; and the duty of the defendants as to said street was, and became at the time hereinafter mentioned, a matter of public and general concern.

4. That on or about the day of 18 , a deep and dangerous excavation (hole or trench) was dug in said street (or an obstruction was placed in said street, and negligently left therein), and suffered by the defendants, during the night of the day of 18 , to remain open, exposed, and without proper protection, and without any light or signal to indicate danger.

5. That the plaintiff on the night aforesaid was lawfully travelling on said street, and was wholly unaware of danger, and was accidentally, and without fault or negligence on his part, precipitated into said excavation (hole or trench), whereby he received great bodily injury, and was made sick and sore, and was thereby kept to his bed, and detained from business for        days, and was in consequence thereof compelled to expend Rs.        for medical attendance and nursing, and has been made permanently lame.

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**Form No. 244.**

**FOR INJURIES CAUSED BY OBSTRUCTION IN STREET.**

Plaintiff states:—

1. That the defendant, on or about the        day of        18        , wrongfully placed large quantities of timber and bricks in the public highway, known as        street, in the town of        , and negligently left the same therein, obstructing the highway during the night-time, and without proper protection or notice to residents and travellers against accidents.

2. That by reason of said negligence and improper conduct of the defendant, in the night-time of that day, the carriage of the plaintiff, with the plaintiff therein, then passing through said street, was accidentally driven against said timber and bricks, and was thereby overturned; by means whereof, &c.

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**Form No. 245.**

**FOR INJURIES CAUSED BY VICIOUS DOG.**

Plaintiff states:—

1. That on the        day of        18        , at        , the defendant was the owner (or keeper) of a certain vicious dog, which was accustomed to bite mankind.

2. That the defendant, well knowing the premises, did wrongfully and injuriously keep and harbour the said vicious dog, and wrongfully and negligently suffered such dog to go at large, without being properly guarded and confined.

3. That while so kept as aforesaid, the said dog did bite and greatly wound this plaintiff (state the particulars), whereby the plaintiff became sick and sore and lame, and so continued for the space of        months, &c.

**When Suit Lies.**—Suit may be brought to recover damages for injuries caused to plaintiff by a mischievous animal kept by the defendant, knowing it to be mischievous.\* The wrongful act consists in insecurely keeping the dangerous animal after knowledge of its mischievous propensities.†

The knowledge of the servant is the knowledge of the owner of the animal,‡ and it is not necessary to show that the animal had actually bitten any one before; it is sufficient if it has evinced a savage disposition;§ neither is it necessary that the defendant should be the owner of the dog, if he knowingly harbours it on his premises; but when the defendant had done all that was reasonable to get rid of a stray dog, he was held not liable for injury done by it.||

**Measure of Damages.**—Compensation awarded may include not only the actual expenses incurred in getting cured, but the bodily pain suffered, as by undergoing a surgical operation, may be considered.¶

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### Form No. 246.

#### AGAINST A PHYSICIAN FOR MALTREATMENT.

Plaintiff states:—

1. That the defendant is, and since the       day of       18       has been, a physician.

2. That in the month of       18       , at       , the plaintiff employed the defendant as such physician, to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose the defendant undertook, as a physician, to attend and cure the plaintiff.

3. That the defendant entered upon such employment, but did not use due and proper care and skill in endeavouring to cure the plaintiff of the said malady, in this, the defendant did not (here state what the defendant failed to do that he should have done, or what he did that he should not have done).

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\* *Thomas v. Morgan*, 2 C. M. and B. 496; *Card v. Case*, 5 C. B. 622.

† *May v. Burdell*, L. J., 9 Q. B. 101; *Jackson v. Smithson*, 15 M. and W. 563.

‡ *Baldwin v. Casella*, L. R., 7 Ex. 325; *Appelbee v. Percy*, L. R., 9 C. P. 647; *Gladman v. Johnson*, L. R., 36 C. P. 153.

§ *Worth v. Gilling*, L. R., 2 C. P. 1.

|| *Simth v. G. E. Ry. Co.*, L. R., 2 C. P. 4.

¶ *Addison on Torts*, 116, 117.

## 178 DIV. III.—SUITS FOR COMPENSATION FOR WRONGS.

4. That by reason of the premises, the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to expend Rs.                      in endeavouring to be cured of said sickness, which was prolonged and increased by the said unskilful and improper conduct of the defendant.

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### Form No. 247.

#### AGAINST SURGEON, FOR MALPRACTICE.

Plaintiff states:—

1. That on the        day of        18    , the plaintiff, by accident broke his leg.

2. That he then employed the defendant, who is a surgeon, as such surgeon, for reasonable reward to be paid therefor, to set and heal the same.

3. That the defendant so negligently and unskilfully conducted himself in attempting to set said leg of the plaintiff, that (here state the consequences, as, inflammation ensued, and the plaintiff was compelled to have his leg amputated).

4. That by reason of said negligence and unskilfulness the plaintiff was made sick, and was kept        months from attending to his business as (engineer), and was compelled to pay and did pay Rs.        expense for nursing, and is permanently a cripple.

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## CHAPTER VI.

### VIOLATION OF PERSONAL RIGHTS.

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#### Form No. 248.

#### AGAINST OFFICERS OF AN ELECTION, FOR REFUSING PLAINTIFF'S VOTE.

Plaintiff states:—

1. That the defendants were inspectors and judges of an election duly held at        , in and for the        ward, in the town of        , on the        day of        18    , for the purpose of electing Municipal Commissioners, and being duly appointed and qualified as such inspectors and judges, the defendants had the polls open for said election at No.        ,        street, in said town, between the hours of        and        on the day aforesaid.

2. That the plaintiff then was, and for the space of                      months had been, a resident of said town (or ward, or otherwise), and was a legal elector at said election (or that the plaintiff was registered in the register of electors of said town, and was enrolled on the poll-lists of said ward.

3. That as such elector, the plaintiff, while the polls were so open, duly offered to the defendants his vote for the election of Municipal Commissioners in and for said town, and requested them to receive the same.

4. That the defendants, not regarding their duty, wrongfully refused to receive the same, although they, and each of them, then well knew that the plaintiff was a qualified voter, whereby he was deprived of his vote at said election.

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Form No. 249.

FOR ENTICING AWAY PLAINTIFF'S WIFE.

Plaintiff states:—

1. That A B is, and, at the times hereinafter mentioned, was the wife of the plaintiff.

2. That on or about the        day of        18       , while the plaintiff was living and cohabiting with, and supporting, her at       , and while they were living together happily as man and wife, the defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of her comfort, society, and assistance, maliciously enticed her away from the plaintiff's, and her, and their residence in       , to a separate residence in       , and has ever since then detained and harboured her, against the consent of the plaintiff.

3. That by reason of the premises the plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress of body and mind in consequence thereof.

**Necessary Averments.**—In a suit for debauching a wife it is not necessary to allege or prove that the defendant knew that the woman was the wife of the plaintiff; but it is necessary in a suit for enticing away or harbouring the wife.\*

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\* 2 Chitty on Pleading, p. 642, note (c).



**Form No. 250.**

**FOR SEDUCTION OF A DAUGHTER.**

Plaintiff states :—

1. That at the time hereinafter mentioned, one A B was the daughter and the servant of the plaintiff.

2. That on the      day of      18      , at      , the defendant, well knowing the said A B to be the daughter and servant of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, and to deprive him of her assistance and service, did, wickedly and maliciously and without the privity or consent of the plaintiff (forcibly, and against, the will of the said A B, abduct her, or entice and persuade the said A B to leave the residence and service of this plaintiff, and did) then and there debauch and carnally know her.

3. That by reason of the premises the said A B became pregnant and sick with child, and so remained for the space of      months ; that during that time she was unable to attend to the duties of her service, and the plaintiff was thereby deprived of her service, and was obliged to expend Rs.      in nursing and taking care of her in her said pregnancy and sickness, and was otherwise greatly injured.

**Measure of Damages.**—In a suit for seduction the true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter, and in an action of tort it should be immaterial whether the damages came out of a deep pocket or not.\*

**Limitation.**—In suits for loss of service occasioned by the seduction of the plaintiffs' servant or daughter, one year from the time when the loss occurred.†

**Form No. 251.**

**AGAINST INNKEEPER FOR REFUSING TO RECEIVE GUEST.**

Plaintiff states :—

1. That at the time hereinafter mentioned, the defendant was the keeper of a common inn in the town of      , known as the Hotel.

\* *Per Blackburn, J., in Hodson v. Taylor, L. R., 9 Q. B. 79, at p. 82.*

† Art. 26, Limitation Act, 1877.

2. That on the       day of       18       , the plaintiff, who was then travelling from       to       , came to said inn, and demanded of defendant that he be received and lodged as a guest during the night and day next ensuing.

3. That the plaintiff was ready and willing to pay and tendered defendant his reasonable charges for such lodging.

4. That defendant had ample room and accommodation to receive and lodge plaintiff during such time, but refused to receive him, whereby (allege special damage).

**Duty of Innkeeper.**—By the common law an innkeeper is bound to receive a traveller, at any hour of the day or night, who presents himself in a proper condition, and is ready to pay for his accommodation, provided there is room to accommodate him,\* but he need not receive any one who is not a traveller.†

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Form No. 252.

AGAINST A WITNESS FOR DISOBEYING A SUBPŒNA.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff caused the defendant to be duly served with a subpoena commanding him to attend as a witness in the Court of       on the       day of       18       , there to give testimony on behalf of the plaintiff in a suit in said Court pending, wherein this plaintiff was the plaintiff, and one C D was defendant.

2. That at the same time the plaintiff caused Rs.       for his travelling and other expenses to be paid (or tendered) to him.

3. That defendant failed to attend as commanded.

4. That because of the said failure of defendant to attend said trial as such witness as aforesaid, the plaintiff, when said suit was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said suit, to move the said Court to postpone the said suit, and the said Court did

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\* *Fell v. Hammond*, 1 C. and K. 404; *Spice v. Bacon*, 36 L. T. 896; *R. v. Rymer*, 2 Q. B. D. 136.

† *R. v. Luellin*, 12 Mod. 445; *R. v. Rymer*, *supra*.

postpone the same, and the plaintiff was compelled to pay on said postponement as costs thereof Rs. , which sum he was so compelled to pay by reason of the said failure of the said defendant to attend as such witness as aforesaid to the damage of the plaintiff in the said sum of Rs.

**When Suit Lies.**—Suits against witnesses for not attending to give evidence in a cause in pursuance of a subpoena duly served upon them are provided for in Bengal, Madras, and Bombay, by Acts XIX. of 1863 and X. of 1855. Suit also lies under those Acts against a person who, being in Court, and being called upon by the Court to give evidence or produce a document, refuses to do so; and also against a person who absconds, or keeps out of the way, in order to avoid service of a subpoena upon him. In order to maintain this suit it is necessary to prove that the evidence of the witness was material and necessary, and that actual damage has been sustained by the non-attendance of the witness. For the English law on this subject see the cases cited below.\*

## SECOND SUB-DIVISION.

### INJURIES TO PROPERTY.

#### CHAPTER I.

#### AGAINST AGENTS AND OTHERS FOR NEGLIGENCE.

##### Form No. 253.

##### AGAINST AGENT FOR NEGLIGENCE IN SELLING TO AN INSOLVENT.

Plaintiff states:—

1. That the plaintiff is a manufacturer of , carrying on business at , and the defendant is a commission-agent carrying on business at .

2. That on the day of 18 , the plaintiff consigned to the defendant for sale tons of .

3. That on or about the day of 18 , the defendant sold tons of , part of such goods, to one G H for Rs. , at three months' credit, and delivered the same to him.

\* Mullett v. Hunt, 1 C. and M. 752; Lamont v. Crook, 6 M. and W. 615; Needham v. Fraser, 1 C. B. 708; 3 D. and L. 190; Culling v. Coxe, 6 C. B. 703; Mastermann v. Judson, 8 Bing. 224; Davis v. Lovell, 4 M. and W. 678; Amey v. Long, 9 East 478.

4. That G H was not, at the time, in good credit, and was in insolvent circumstances, and the defendant might, by ordinary care and diligence, have ascertained the fact.

5. That G H did not pay for said goods, but before the expiration of the said three months for which credit had been given was adjudicated an insolvent, and the plaintiff has never received the said sum of Rs. , or any part thereof.

**Agent Defined.**—An agent is a person employed to do any act for another, or to represent another, in dealings with third persons ; no consideration is necessary to create an agency.\*

**Form of Suit.**—Suits against agents for neglect or misconduct may, in general, be brought either as for a breach of contract, or as for a wrong.

**Liability of Agent.**—A person who undertakes to perform a commission is liable for his negligence therein, even if he acted gratuitously.† An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses, and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.‡

**Duty of Agent.**—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business.§

A broker cannot sell on credit if it is unusual to do so.¶

**Limitation.**—In all suits by principals against agents for neglect or misconduct, three years from the time when the neglect or misconduct becomes known to the plaintiff.¶

\* Contract Act, 1872, ss. 182, 185.

† *Elsee v. Galward*, 5 T. R. 143 ; *Dartnall v. Howard*, 4 B. and C. 345 ; *Whithead v. Greetham*, 2 Bing. 464 ; *Hart v. Miles*, 4 C. B. N. S. 371 ; 27 L. J., C. P. 218 ; *Balfe v. West*, 13 C. B. 466 ; 22 L. J., C. P. 175.

‡ Contract Act, 1872, s. 212.

§ Contract Act, 1872, s. 211.

¶ *Wilshire v. Sims*, 1 Camp. 258.

¶ Art. 90, Limitation Act, 1877.

## Form No. 254.

AGAINST A *del credere* AGENT.

Plaintiffs state :—

1. That the plaintiffs are merchants carrying on business at \_\_\_\_\_, and defendant is a broker in the jute-trade, carrying on business at \_\_\_\_\_.

2. That in the month of \_\_\_\_\_ 18\_\_\_\_, the defendant was employed by the plaintiffs as such broker upon the terms usual in the jute-market to sell for them a certain consignment of jute in the \_\_\_\_\_ market.

3. That one of the said terms usual in the \_\_\_\_\_ jute-market was, that if selling brokers do not name the purchaser in the contract-note furnished by them to their principals, they are liable as *del credere* agents for the price of the jute sold.

4. That defendant accordingly sold in the \_\_\_\_\_ jute-market the said consignment of jute for a sum of Rs. \_\_\_\_\_, and furnished to the plaintiffs a contract-note showing such sale; but the purchaser was not named in such contract-note.

5. That the said purchaser of the said consignment of jute did not at the proper time pay and has not paid the said price or any part of the said price of the said jute.

6. That the defendant has not paid to the plaintiffs the said price or any part thereof; and the same is still due and payable by the defendant to the plaintiffs.

**Liability of a Del Credere Agent.**—A *del credere* agent makes himself in consideration of a higher commission, responsible for the solvency of the persons to whom he sells, and, in fact, he becomes liable to the principal for the payment of the price of the goods he sells.\*

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\* MacKenzie v. Scott, 6 Bro. P. C. 291; *Ex parte* White, L. R., 6 Ch. Ap. 397, 403; 40 L. J., C. B. 73; Morris v. Cleasby, 4 M. and S. 574; Catterall v. Hindle, L. R., 1 C. P. 191; 31 L. J., C. P. 161; and see Leake on Contracts, 521.

## Form No. 255.

## AGAINST AGENT FOR SELLING BELOW LIMIT.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff, who is a       , employed the defendant as his agent to sell (describe goods) upon the terms contained in a letter, bearing date the       day of       18       , and written by the plaintiff to the defendant, which, so far as is material, were that the defendant should sell the said goods at       and for no less money than the sum of Rs.       , and should not sell them otherwise.

2. That the plaintiff delivered said goods to the defendant for that purpose.

3. That the defendant, without the knowledge or consent of the plaintiff, sold said goods for less than the sum to which he was so limited as aforesaid, to wit, for Rs.       .

## Form No. 256.

## AGAINST AUCTIONEER FOR SELLING ON CREDIT AGAINST ORDERS.

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant was engaged in the business of an auctioneer, and, in consideration that the plaintiff would deliver to him (describe goods) to be sold by him for the plaintiff for a compensation, undertook, as such, at the time and place aforesaid, to sell the same for cash, and not otherwise.

2. That the plaintiff delivered said goods to the defendant for that purpose.

3. That the defendant afterwards sold said goods on credit without the plaintiff's consent, and the parties to whom such sale was made are, and then were, wholly insolvent, and the debt is of no value.

## Form No. 257.

## AGAINST AGENT FOR NOT ACCOUNTING.

Plaintiff states :—

1. That on or about the       day of       18       , at       , the plaintiff shipped from the port of       , consigned to the defendant, then his agent at       , to sell for cash (describe goods), of the

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value of Rs. , and gave notice of said consignment to defendant, which agency, for a valuable consideration, he undertook and entered upon.

2. That he received said goods, and thereafter sold the same, on account of the plaintiff, for Rs. .

3. That a sufficient and a reasonable time has elapsed since said goods were received and sold by defendant, yet he has neglected and refused, and still neglects and refuses, to render to plaintiff a just and true account of such sale, and of the proceeds thereof, and has also neglected and refused to pay over the proceeds to the plaintiff.

**Duty of Agent to Account.**—An agent is bound to render proper accounts to his principal on demand,\* and if he refuses to do so, he is liable to an action,† but he is not bound to pay over the money received on account of goods sold, until the whole consignment is disposed of.‡ If he fail to render an account, he will be presumed to have sold the goods entrusted to him, and to have received the money.§

**Limitation.**—In a suit against a factor for an account, three years from the time when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made when the agency terminates.||

### Form No. 258.

#### AGAINST AN ATTORNEY FOR NEGLIGENCE.

Plaintiff states :—

1. That the defendant is, and at the times hereinafter mentioned was, an attorney of the High Court of .

2. That in the month of 18 , the plaintiff retained and employed the defendant as such attorney to prosecute and conduct a suit in the Court of on behalf of this plaintiff against one A B for the recovery of Rs. , due from him to this plaintiff; and the defendant undertook to prosecute said suit in a proper, skilful, and diligent manner, as the attorney of the plaintiff.

\* Contract Act, 1872, s. 218.

† Topham v. Braddick, 1 Taunt 571; Annoda Persad Roy v. Dwarkanath Gangopadhyay, 1 L. R., 8 Cal. 764.

‡ Contract Act, 1872, s. 218.

§ Hunter v. Welsh, 1 Stark 224.

|| Art. 83, Limitation Act, 1877.

3. That the defendant might, in case he had prosecuted said suit with due diligence and skill, have obtained final judgment therein for this plaintiff before the day of 18 , but he so negligently and unskillfully conducted said suit, that by his negligence, delay, and want of skill, he did not obtain judgment until the day of 18 , and meanwhile said A B had become insolvent; whereby the plaintiff was hindered and deprived of the means of recovering said sum of money, and that the same has not, nor has any part thereof, been recovered by the plaintiff.

**Liability of Attorney.**—There must be gross negligence or ignorance in the performance of his professional duties by an attorney to render him liable to an action by his client.\* He is bound to bring a fair amount of skill, care, and knowledge to the performance of his duty; and he is liable for the consequence of ignorance or non-observance of the rule of practice of the Court in which he sues, and for the want of care in the preparation of the cause for trial.†

### Form No. 259.

#### AGAINST ATTORNEY FOR NEGLIGENT DEFENCE.

Plaintiff states:—

1. That the defendant is, and at the times hereinafter mentioned was, an attorney-at-law, and the plaintiff in the month of 18 , at , retained him, as such, to defend, on behalf of this plaintiff, a suit brought against him by A B, then pending in the Court of , for the recovery of Rs. , and the defendant undertook to defend said suit in a proper, skilful, and diligent manner, as the attorney of the plaintiff.

2. That such proceedings were had in said suit, and that on or about the day of . 18 , it became the duty of the defendant, as the attorney of this plaintiff, to file a written statement on his behalf, but he wholly neglected so to do, and by reason thereof, and through his neglect, judgment by default was obtained against this plaintiff, and by reason thereof this plaintiff was compelled to pay to the said A B Rs. , the sum so recovered by him, and was put to costs

\* Purvis v. Landell, 12 Cl. and F. 91.

† Godfray v. Dalton, 6 Bing. 467-69; Hunter v. Caldwell, 10 Q. B. 69, 83; 16 L. J., Q. B. 274.



and charges in his endeavour to defend said suit, amounting to Rs. , and lost the means of recovering the same back from the said A B.

**Power of Pleaders, &c., to bind Client.**—Parties are bound by the *bond fide* acts of their pleaders within the scope of their authority.<sup>o</sup> If a pleader conducting a case makes an admission as to payments made, and the state of an account between the parties, it is binding on the client.<sup>†</sup> Under a *vakalatnama* couched in general terms a *vakil* has power to withdraw a suit and bind a client ;<sup>‡</sup> but it is not within the ordinary scope of his authority to compromise a suit,<sup>§</sup> or instead of conducting the defence in the usual way to bind his client to abide by plaintiff's oath,<sup>||</sup> or to give up part of the property in dispute.<sup>¶</sup> As to the power of attorneys to compromise, see *per Westropp, C.J.*, in *Jagganath Dass v. Ramdas*.<sup>oo</sup>

In England Counsel have complete authority over the suit, the mode of conducting it, and all that is incident to it,<sup>††</sup> and a compromise made by Counsel is binding on the client,<sup>‡‡</sup> unless the compromise was effected under a misapprehension, or through a misstatement, or without full knowledge of material facts.<sup>§§</sup>

### Form No. 260.

#### AGAINST ATTORNEY FOR NEGLIGENCE IN EXAMINING TITLE.

Plaintiff states :—

1. That at the time hereinafter mentioned, the plaintiff made a contract with one A B, for the purchase from him of a certain piece of land (describe the same), for the sum of Rs. , which property said A B assumed to have power to convey free of all incumbrances.

<sup>o</sup> *Pesoh v. Kasee Madud Hossein*, S. D., N. W., 1855, p. 68.

<sup>†</sup> *Berkley v. Mussamut Chittur Kooar*, I. L. R., 5 All. 2; *Kalee Kanund Batta-charjee v. Gireebala Debia*, 10 W. R. 322; *Rajandar Narain Rao v. Bijai Gobind Sing*, 2 Moore's Indian Appeals 253.

<sup>‡</sup> *Ram Coomarr Roy v. Collector of Beerbhoom*, 5 W. R. 80.

<sup>§</sup> *Prem Sookh v. Pirthee Ram*, 2 Agra H. C. R. 222; *Mussamut Sirdar Begum v. Mussamut Issut-ool-Nissa*, I. L. R., 2 All. 149.

<sup>||</sup> *Mussamut Hakeem v. Beldeo*, 4 Agra H. C. R. 361; but see *Rajender Chunder v. Mahamed Aymoodeen*, W. R., 1864, p. 143.

<sup>¶</sup> *Ram Kant Chowdry v. Brindaban Chunder Dass*, 16 W. R. 246; *Gour Pershad Dass v. Sookdeb Ram Deb*, 12 W. R. 279; *Sheik Abdul Sabhan Chowdry v. Shih Kiste Daw*, 8 B. L. R., App. 15.

<sup>oo</sup> 7 Bom. H. C. R. 79.

<sup>††</sup> *Swingen v. Lord Ohelmsford*, 29 L. J., Ex. 397.

<sup>‡‡</sup> *Strauss v. Francis*, L. R., 1 Q. B. 379.

<sup>§§</sup> *Holt v. Jesse*, 3 Ch. D. 177.

2. That the defendant was an attorney; and the plaintiff at , in the month of 18 , employed him as such to examine the title of A B to said land, and to ascertain if the title was good, and if any incumbrances existed thereon, and to cause and procure the same to be conveyed to the plaintiff clear of all incumbrances, which the defendant, for compensation, agreed to do.

3. That the defendant negligently and unskilfully conducted such examination, and did not use endeavours to cause or procure a good and sufficient title, clear of incumbrances, to be conveyed to the plaintiff, but wrongfully advised and induced the plaintiff to pay said A B the sum of Rs. , being said purchase-money of the premises, when in fact said A B had no title thereto (or when said property was subject to incumbrances, specifying them and amount), and the plaintiff, in order to release the premises from said incumbrances, was obliged to pay the holders thereof the sum of Rs.

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Form No. 261.

AGAINST CONTRACTOR FOR LEAVING STREET IN INSECURE STATE.

Plaintiff states :--

1. That at the times hereinafter mentioned, the defendant had contracted with to lay down pipes in and under the highway known as street in for the purpose of supplying the said with water, and to make the proper trenches for the purpose; and when such pipes were laid down to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

2. That the defendants and his servants, on the day of 18 , took up part of the said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and materials of the said highway, and carelessly and negligently left the said highway in a dangerous and improper state, in consequence whereof a horse of the plaintiff, of the value of Rs. , which he was then and there lawfully driving along said highway, fell into and sunk therein, and was wounded and lamed, and rendered of no value.

## Form No. 262.

AGAINST RAILWAY FOR LEAVING TRACK UNFENCED, AND THEREBY  
KILLING CATTLE.

Plaintiff states :—

1. That at the time hereinafter mentioned, the defendants were the owners of a certain railway, known as the                      Railway, together with the track, carriages, locomotives, and other appurtenances thereto belonging; and the plaintiff was the owner and possessed of certain cattle, to wit, five cows and two oxen, of the value of Rs.                      .

2. That on the              day of              18              , the defendants left the track and ground occupied by the said railway at              unfenced and unprotected, and plaintiff's said cows and oxen casually, and without the fault of plaintiff, strayed in and upon said track and ground.

3. That the defendants, by their servants not regarding their duty in that respect, so carelessly and negligently ran and managed said locomotives and carriages, that ~~the same~~ ran against and over the plaintiff's said cows and oxen, and killed and destroyed the same.

## Form No. 263.

FOR KINDLING FIRE ON DEFENDANT'S LAND WHEREBY PLAINTIFF'S  
PROPERTY WAS BURNED.

Plaintiff states :—

1. That on the              day of              18              , at              , the plaintiff was possessed of about              acres of land in              , on which there was an orchard and fences, and also a godown containing              tons of hay.

2. That the defendant on that day intentionally kindled a fire on his land next adjoining to the plaintiff's, and at the distance of              feet therefrom, and so negligently watched and tended the said fire that it came into the plaintiff's said land, consumed said godown and hay of the value of Rs.              , and also (state special damage).

## Form No. 264.

## FOR KEEPING DOG ACCUSTOMED TO BITE ANIMALS.

Plaintiff states :—

1. That at the time hereinafter mentioned, the defendant wrongfully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite (sheep and lambs, or as the case may be).

2. That on the      day of      18      , at      , the said dog, while in the keeping of the defendant, attacked and bit (or hunted, chased, bit, and worried), (sheep, lambs, or as the case may be) of the plaintiff.

3. That in consequence thereof, six of plaintiff's said (sheep, lambs, or otherwise) of the value of Re.      , died, and became of no value to the plaintiff, and the residue of the said (sheep, lambs, &c.), being also of great value, were injured, and rendered of no value to the plaintiff.

**When Suit Lies.**—Although a person cannot be held liable for injury to the person of another caused by a mischievous animal of which he is the owner, unless it is proved that he knew of its ferocity, the owner of sheep or cattle can recover for injury done to them without averring or proving any such scienter.\* Where defendant, an agister of cattle, placed plaintiff's horse in a field, knowing that a bull kept on adjoining land had several times been found in the field in which the horse was placed, and that there was no sufficient fence to keep it out, and there were several heifers in the field with the horse, and the horse was gored and killed by the bull; in an action for breach of contract in not taking reasonable care of the horse, it was held that a knowledge of the mischievous nature of the bull was not essential to the liability of defendant, and a verdict against him would not be disturbed for want of such knowledge.†

## Form No. 265.

## FOR FLOWING WATER FROM ROOF ON PLAINTIFF'S PREMISES.

Plaintiff states :—

1. That on the      day of      18      , the plaintiff was lawfully possessed of a dwelling-house and premises at      , in which the plaintiff and his family then lived.

\* *Wright v. Pearson*, L. R., 4 Q. B. 582.

† *Smith v. Cook*, L. R., 1 Q. B. D. 79.

2. That the defendant erected a building near the said dwelling-house of the plaintiff in so careless and improper a manner that by reason thereof, on said day, and at other times afterwards, and before this action, large quantities of rain-water ran from said building upon and into the said dwelling-house and premises of the plaintiff, and the walls, ceiling (or otherwise state damage according to the fact), and other parts thereof, were thereby wet and damaged, and became not fit for habitation.

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**Form No. 266.**

**FOR UNDERMINING PLAINTIFF'S LAND.**

Plaintiff states :—

1. That at the time hereinafter mentioned, the plaintiff was possessed of certain land (describe it).

2. That in the month of                      18   , the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way.

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**Form No. 267.**

**FOR NOT USING DUE CARE AND SKILL IN REPAIRING WATCH.**

Plaintiff states :—

1. That the defendant is a watchmaker at                     , and on the day of                      18   , the plaintiff delivered to him, as such, a gold watch of the plaintiff, of the value of Rs.                     , to be repaired by the defendant, for reward.

2. That the defendant then and there undertook the said employment, and to use due care and skill in repairing said watch, and to take due care thereof while in his possession, and to re-deliver the same to the plaintiff on request.

3. That the defendant did not take proper care of the said watch whilst in his possession, and did not use due care and skill in repairing the said watch, but, on the contrary, did his work in so careless and unworkmanlike a manner that no benefit was derived therefrom, and the said watch was broken and rendered worthless.

## CHAPTER II. BAILMENTS.

### Form No. 268.

#### FOR INJURY TO PLEDGE.

Plaintiff states :—

1. That on the      day of      18      , at      , the plaintiff delivered to the defendant (describe articles), the property of this plaintiff, of the value of Rs.      , as a pledge to the defendant, to secure the sum of Rs.      theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by plaintiff.

2. That the defendant so negligently conducted himself in respect to said articles, and so carelessly used the same, that they became, by reason of his negligence and carelessness, greatly damaged (state injury), and were rendered of small value to the plaintiff.

**Bailment Defined.**—Bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned, or otherwise disposed of, according to the directions of the person delivering them.\*

**Classification of Bailments.**—Lord Holt† has classified bailments as follows :—

1. *Depositum*—where the goods are delivered to be kept by the depositor for the bailor without reward ;
2. *Commodatum*—where goods are lent to some person gratis to be used by him ;
3. *Locatio rei*—where goods are lent out to a person for hire ;
4. *Vadium*—where goods are pawned or pledged ;
5. *Locatio operis faciendi*—where something is to be done to goods, or they are to be carried, for reward ; and
6. *Mandatum*—where goods are to be carried gratis.

**Pledge Defined.**—Pledge is the bailment of goods as security for payment of a debt, or performance of a promise.‡

\* Contract Act, 1872, s. 148.

† In *Coggs v. Bernard*, 1 Smith's L. C. 199 ; Ld. Raym. 909.

‡ Contract Act, 1872, s. 172.

**Liability of Bailee.**—In *all* cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value, as the goods bailed.\* The rule laid down in section 151 of the Contract Act, 1872, applies, whatever is the purpose of the bailment, whether for the benefit of the bailor or bailee, and whether gratuitous or not.†

The fact that the bailee's good were lost at the same time is not sufficient ground for acquitting him of negligence with regard to the bailor's goods.‡

If the bailee is not aware of the contents of a box, his care need only be proportioned to the apparent value.§

### Form No. 269.

#### FOR LOSS OF PLEDGE.

Plaintiff states:—

1. That on the       day of       18       , at       , the plaintiff delivered to the defendant (describe goods), the property of this plaintiff, of the value of Rs.       , by way of pledge to the defendant, to secure the sum of Rs.       theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by the plaintiff.

2. That the defendant has failed to fulfill said agreement on his part; and, on the contrary, so negligently and carelessly kept said articles, that, while they were in his possession for the purposes aforesaid, they were through his negligence lost.

**Demand.**—The bailee must return the goods without demand.||

**Accretions.**—The bailor is entitled to any increase or profits which may have accrued from the goods bailed.¶

**Rights of Pawnee.**—The pawnee is entitled to receive from the pawnor all expenses, ordinary or extraordinary, incurred by him for the preservation of the goods pledged; \*\* and he may sell the thing pledged on giving reasonable notice.††

**Limitation.**—In a suit against a depository or pawnee to recover moveable property deposited or pawned, thirty years from the date of the deposit or pawn.

\* Contract Act, 1872, s. 151.

† MacKilloan v. Compagnie de Messageries Maritimes, 1. L. R., 6 Cal. 227.

‡ Doorman v. Jenkins, 2 A. & E. 256.

§ Addison on Contracts, 6th edition, 417.

|| Contract Act, 1872, s. 160.

¶ Contract Act, 1872, s. 163.

\*\* Contract Act, 1872, ss. 173 and 175.

†† Contract Act, 1872, s. 176.

## Form No. 270.

## AGAINST BAILEE FOR REWARD.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff delivered to the defendant (describe the goods), of the value of Rs.       , to be safely kept and taken care of by the defendant for the plaintiff, for reward to the defendant, and to be returned and re-delivered to the plaintiff on request, and the defendant received the said goods in his care and keeping for the purpose and on the terms aforesaid.

2. That the plaintiff performed all the conditions of the said agreement on his part, and, on the       day of       18       , requested the defendant to re-deliver said goods.

3. That the defendant did not take care of, and safely keep, the said goods for the plaintiff, nor did he, when so requested, or at all, re-deliver the same to the plaintiff; but, on the contrary, the defendant so negligently and carelessly conducted himself with respect to the said goods, and took so little care thereof, that by and through the carelessness, negligence, and improper conduct of the defendant and his servants, the goods were wholly lost to the plaintiff.

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Form No. 271.

## AGAINST HIRER OF GOODS FOR NOT TAKING PROPER CARE OF THEM.

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant hired and received of the plaintiff certain furniture (briefly designate the same), of the value of Rs.       , for the period of       months then next ensuing, at the sum of Rs.       per month.

2. That the defendant did not take proper care of the said furniture, or use the same in a reasonable or proper manner, during the said time, but took so little care thereof that they became injured and deteriorated in value.



## Form No. 272.

## FOR INJURY TO HORSE RESULTING FROM IMMODERATE DRIVING.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant hired and received from the plaintiff a horse to drive, which was of the value of Rs.       .

2. That the defendant drove the horse so hard, and so neglected the care of him, that the said horse afterwards, and because of the said immoderate driving, and want of proper and reasonable care, on the day of       18       , died (or otherwise state the injury).

## Form No. 273.

## FOR DRIVING A HORSE ON A DIFFERENT JOURNEY FROM THAT AGREED.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant hired and received from the plaintiff a horse and carriage, of the value of Rs.       , the property of the plaintiff, to drive from       to       , and not elsewhere.

2. That the defendant, in violation of the agreement, performed a different journey than that aforesaid, and drove said horse and carriage from       to       .

3. That he did not take proper care of the said horse and carriage, but so negligently drove and managed the same that the carriage was broken.

**Liability of Bailee.**—If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.\*

## Form No. 274.

## AGAINST INNKEEPER—FOR LOSS OF BAGGAGE.

Plaintiff states:—

1. That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the town of       , known as the Hotel.

\* Contract Act, 1872, s. 154.

2. That on the       day of       18       , this plaintiff was received by the defendant into his said inn as a traveller, together with his baggage, consisting of one trunk, containing (describe articles), of the value of Rs.       , the property of the plaintiff.

3. That the defendant and his servants so negligently and carelessly conducted themselves and misbehaved in regard to the same, that while he so remained at the said inn, his said trunk was taken away from the room of the plaintiff (or the said trunk was broken open and the said articles stolen), by some person or persons to the plaintiff unknown, and thereby the same was wholly lost to the plaintiff.

**Liability of Innkeeper.**—An innkeeper is not an insurer of his guest's luggage, but he is liable for the negligence or default of himself and his servants.\*

**Innkeeper Defined.**—To constitute a person an inn-keeper he must profess to entertain and lodge all travellers; consequently boarding-house-keepers, lodging-house-keepers, and the owners of public houses, who do not let bedrooms, are not inn-keepers at common law.

**Necessary Averments.**—Plaintiff must prove that he was a guest in the inn at the time of the loss; but it is sufficient if he was there only for temporary refreshment,† and it is not necessary that he should have lodged in the inn at all.

### Form No. 275.

#### THE SAME—FOR LOSS OF HORSE.

Plaintiff states:—

1. (As in preceding form.)

2. That on the       day of       18       , the plaintiff was received by the defendant into his said inn as a traveller, and the plaintiff then and there delivered his horse called       , of the value of Rs.       , to the defendant at the said hotel to be kept and taken care of by the defendant for the plaintiff, for reward to the defendant, and re-delivered by the defendant to the plaintiff on demand.

3. That the defendant, though he received the said horse upon the terms aforesaid, did not keep, and take due care of, the said horse, and did not re-deliver the said horse to the plaintiff, although required by

\* *Oalye's Case*, 1 Smith's L. C., 6th edition, 106; *Dawson v. Chamney*, 5 Q. B. 164; *Spice v. Bacon*, 36 L. T. 896; but see *contra Morgan v. Ravey*, 6 H. & N. 265.

† *Bennett v. Mellon*, 5 T. R. 273.

the plaintiff so to do, and negligently, and without the authority of the plaintiff, delivered the said horse to, or allowed the same to be taken away from, the said hotel by persons other than the plaintiff, whereby the said horse was lost to the plaintiff.

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**Form No. 276.**

**THE SAME—FOR LOSS OF POCKET-BOOK.**

**Plaintiff states:—**

1. (As in Form No. .)

2. That on the        day of        18       , the defendant received and entertained the plaintiff as a guest at his inn for hire.

3. That while the plaintiff was his guest, the defendant undertook to keep safely in one of his sleeping rooms of his said hotel or inn the clothing and such articles of jewellery and valuables as the plaintiff then had upon his person, and that the plaintiff thereupon put into his said sleeping room in said hotel or inn his clothing, his pocket-book containing money, and such other property as is usually carried upon the person, of the value of Rs.       , and left the same in the possession and charge of the defendant as inn-keeper.

4. That while the plaintiff was sleeping, his pocket-book and money were, by the negligence, carelessness, dishonesty, and improper management of the defendant and his servants, lost and stolen.

5. That the amount of the said money so lost and stolen, while the same was under the charge of the defendant, was Rs.       .

6. That plaintiff is by profession a       , and such sum was such as he might reasonably and properly carry with him with reference to his circumstances and business.

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**Form No. 277.**

**AGAINST WAREHOUSEMAN—FOR REFUSAL TO DELIVER GOODS.**

**Plaintiff states:—**

1. That on the        day of        18       , at       , the defendant, in consideration of the payment to him of Rs.        (or Rs.        per barrel per month), agreed to keep in his godown one hundred barrels of flour, and to deliver the same to the plaintiff on payment of said sum,

2. That thereupon the plaintiff deposited with the defendant the said hundred barrels of flour.

3. That on the      day of      18      , the plaintiff requested the defendant to deliver the said goods, and tendered him Rs.      (or the full amount of storage due thereon), but the plaintiff refused to deliver the same.

4. That the plaintiff was thereby prevented from selling the said goods to E F, and the same are lost to the plaintiff.

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### CHAPTER III. COMMON CARRIERS.

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#### Form No. 278. FOR REFUSING TO CARRY GOODS.

Plaintiff states:—

1. That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire from      to      .

2. That on the      day of      18      , the plaintiff, at a reasonable and proper time in that behalf, tendered to the defendant at aforesaid, at his place of business for the receipt of goods to be carried by him as such carrier, certain goods of the plaintiff, namely (describe the goods), the property of the plaintiff, and requested the defendant as such carrier to receive the same, and carry them from      to      aforesaid, and at the last mentioned place to deliver the same for the plaintiff for hire to the defendant.

3. That plaintiff was then ready and willing, and offered to pay to the defendant his reasonable hire in that behalf.

4. That defendant had then sufficient time, means, and convenience to receive and carry and deliver the said goods as aforesaid, and could and ought to have done so.

5. That defendant, nevertheless, did not and would not receive and carry the said goods for the plaintiff.

**Common Carrier Defined.**—A common carrier is a person who undertakes to transport, from place to place, for hire, the goods of those who think fit to employ him.

**Duty of Common Carrier.**—Common carriers are bound to receive and carry all goods offered to them, provided they have convenience to carry them, if the person requiring them to be carried is ready and willing to pay a reasonable hire;\* to carry and deliver within a reasonable time;† and to insure the safe delivery of the goods, the act of God and the Queen's enemies alone excepted.‡ They may refuse to carry if they have not accommodation for the goods,§ or if the goods are unusually hazardous, or unusually dangerous to carry,|| or if they are tendered at an unreasonable time.¶

In the absence of express agreement or usage, carriers by land are bound to deliver to, or at the residence of, the consignee; and with regard to carriers by sea, it is sufficient if the captain deposits the goods in a place of safety, and gives notice to the consignee.\*\*

Carriers are not bound to charge all persons alike.

**Act of God Defined.**—The expression "act of God" as used in the law of carriers, includes all such acts as could not be prevented by human care, skill, and foresight,†† such as storms, lightnings, and tempests.‡‡

### Form No. 279.

#### FOR LOSING GOODS.

Plaintiff states:—

1. That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire between the places hereinafter mentioned.

2. That on the       day of       18       , at       , one A B delivered to the defendant certain goods, the property of the plaintiff, to wit (describe the goods), of the value of Ra.       , and the defendant, as such carrier, received the same, to be by him safely carried

\* *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372; *Johnson v. Midland Ry. Co.*, 4 Ex. 317; *Garton v. Bristol & Exeter Ry. Co.*, 30 L. J., Q. B., 278.

† *Hales v. L. & N.-W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B., 292.

‡ *Forward v. Pittard*, 1 T. R. 27; *Ppazi v. Shipton*, 8 A. & E. 963; *Riley & Horne*, 5 Bing. 217; *Bourne v. Gatcliffe*, 3 M. & G. 648; *Richards v. L. & B. & S. O. Ry. Co.*, 7 C. B. 839; *Wyld v. Pickford*, 8 M. & W. 443; *Nugent v. Smith*, 1 C. P. D. 423; 45 L. J., C. P., 697.

§ *Lovett v. Hobbs*, 2 Show 428; *Riley v. Horne*, 5 Bing. 217.

|| *Edwards v. Sherratt*, 1 East 604.

¶ *Lane v. Cotton*, 1 Ld. Raym. 652; *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 706.

\*\* *Hyde v. Trent & Mersey N. Co.*, 1 I. R. 397.

†† *Trent N. Co. v. Wood*, 3 Esp. 127; 1 T. R. 127; *Siordet v. Hall*, 4 Bing. 607.

‡‡ *Nugent v. Smith*, 1 C. P. D. 34, 423; 45 L. J., C. P., 28, 697.

to, and there delivered to \_\_\_\_\_, or order, for a reasonable reward to be paid by \_\_\_\_\_ therefor (or then paid to him by the plaintiff):

3. That the defendant did not safely carry and deliver said goods; but, on the contrary, so negligently conducted himself, and so misbehaved in regard to the same, as such carrier, that the same were wholly lost to the plaintiff.

**Form of Complaint.**—In suits against common carriers, the plaint may be framed either as for a wrong, or as for a breach of contract; the duties imposed being identical.\*

**Who are Entitled to Sue.**—Suit must be brought by the owner of the goods, and he may be either the absolute or the special owner.† It is often difficult to determine whether suit should be brought by the consignee or consignor, but the rule seems to be that if, at the time of delivery, the property in the goods has passed to the consignee, then the consignor is simply the agent of the consignee for the employment of the carrier, and the consignee is therefore the proper person to sue;‡ but when the property in the goods remains with the consignor, as, for instance, when goods are forwarded for sale on approval, then the consignor should sue.§ As a rule, delivery to the carrier is delivery to the consignee,|| and it is for him that the goods are carried; and it is immaterial that the consignor paid the carriage.¶

**Liability of Common Carriers.**—The Bombay High Court have held in the case of *Kuverji Tulsidas v. G. I. P. Railway Company*\*\* that the English law respecting common carriers is not in force in India, and that the liability of carriers for loss or damage is prescribed by sections 151 and 152 of the Contract Act, 1872: but this decision may be considered as practically overruled by a recent decision of the Calcutta High Court, where it was held that the common law of England regulating the responsibility of common carriers was, at the time of the passing of the Carriers Act, 1865, and is still, in force in this country, and is unaffected by the provisions of the Indian Contract Act, 1872, and consequently that the liability of common carriers in India is not regulated by sections 151 and 152 of that Act.††

The carrier is liable for the whole distance over which he contracts to carry; consequently Railway Companies contracting to carry over the lines of other Com-

\* See *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex., 181, 184.

† *Freeman v. Birch*, 3 Q. B. 492.

‡ *Dawes v. Peck*, 8 T. R. 330; and see *per Parke, B.*, in *Waite v. Baker*, 2 Ex. 17.

§ *Swain v. Shepperd*, 1 M. & Rob. 223; *Sargent v. Morris*, 3 B. & Ald. 277; *Freeman v. Birch*, *supra*.

|| Contract Act, 1872, s. 91.

¶ *King v. Meredith*, 3 Camp. 689.

\*\* I. L. R., 3 Bom. 109.

†† *Moothoora Kant Shaw v. The I. G. S. N. Co.*, I. L. R., 10 Cal. 166.

panies are liable for the whole distance.\* As a rule, the contracting Company alone can be sued, but the delivering Company will be liable when receiving Company contracts as agent for the other.† The question whether the one Company contracts as agent of the other depends in each case upon the evidence given of the arrangements between the Companies, and of the contract made with the consignor.‡ When two Companies interchange traffic, goods, and passengers with through-ticket rates and invoices, payment being made at either end, and profits shared by mileage, the receiving Company, by granting a receipt-note for goods to be carried over, and delivered at a station of the delivering Company's line, does not thereby contract with the consignor of the goods as agent of the delivering Company.§ On the other hand, it has been held that when between two Railway Companies there existed an agreement arranging for the interchange of traffic, which provided, *inter alia* that goods should be booked to and from all stations on both lines at certain stated rates, and that in such cases one Company should receive payment, and should account to the other, and that any claim for loss or damage should be paid by the Company in whose charge the goods were when the goods were lost or damaged, or if that could not be ascertained, then by both Companies rateably, the agreement between the two Companies showed that the one contracted as agent for the other.||

Common carriers from a place within, to a place without, the realm are subject to the liabilities of common carriers for the whole distance.¶

After arrival of the goods at their destination common carriers are no longer liable as insurers; but they must take reasonable care of them.\*\*

In respect of live-stock, carriers are not responsible for injuries caused by the inherent vice of the animal, if they have provided proper means of conveyance,†† unless the vice is brought out by the negligence or default of the carrier.‡‡

\* *Welby v. West Cornwall Ry. Co.*, 27 L. J., Ex., 181; *Blake v. G. W. Ry. Co.*, 31 L. J., Ex., 396; *Collins v. Bristol and Exeter Ry. Co.*, 29 L. J., Ex., 41; *Thomas v. Rhymney Ry. Co.*, L. R., 6 Q. B. 266; 39 L. J., Q. B., 141.

† *Coxon v. G. W. Ry. Co.*, 29 L. J., Ex., 165; *Gill v. M. S. & L. Ry. Co.*, L. R., 8 Q. B. 186; *Foulkes v. Met. Dist. Ry. Co.*, 5 C. P. D. 157; 49 L. J., C. P., 361.

‡ *Kalu Ram v. Madras Ry. Co.*, I. L. R., 3 Mad. 241.

§ *Kalu Ram v. Madras Ry. Co.*, *supra*.

|| *G. I. P. Ry. Co. v. Radha Kissen*, I. L. R., 5 Bom. 371.

¶ *Crouch v. L. & N. W. Ry. Co.*, 14 C. B. 255; 23 L. J., C. P., 129; *Nugent v. Smith*, 1 C. P. D. 423; 45 L. J., C. P., 697.

\*\* *Garside v. Trent Nav.*, 4 T. R. 581; *Sheppard v. Bristol and Ex. Ry. Co.*, L. R., Ex., 189; 37 L. J., Ex., 118; *Chapman v. G. W. Ry. Co.*, 5 Q. B. Div. 278; 49 L. J., Q. B., 420; *Hough v. L. and N. W. Ry. Co.*, L. R., 5 Ex. 51; *Notara v. Henderson*, L. R., 7 Q. B. 225; *Gandet v. Brown*, L. R., 5 C. P. 134.

†† *Blower v. G. W. Ry. Co.*, L. R., 7 C. P. 655, 663, 664; 41 L. J., C. P., 268; *Cart v. Lancashire and York Ry. Co.*, 21 L. J., Ex., 263.

‡‡ *Gill v. M. S. and L. Ry. Co.*, L. R., 8 Q. B. 186; 42 L. J., Q. B., 89.

**Measure of Damages.**—In a suit for the loss or destruction of the goods the plaintiff is entitled to recover their market-value at the place and time at which they ought to have been delivered.\* In case of delay in the transmission, the plaintiff may recover the difference between the market-price of the goods on the day when they ought to have been delivered, and the price when they were available for sale, owing to delay caused by the defendants.† Mere notice of the object for which the goods are required is not sufficient to render the carrier liable for the loss of profits which would have accrued from the employment of the goods in the manner intended; in order to make the carrier liable for prospective profits the notice must have been given under such circumstances as to make it a part of the contract.‡

**Onus Probandi.**—It is not necessary for the plaintiff to give evidence of negligence,§ unless the defendant has shown that the injury was occasioned by a cause which was within the exceptions; then the plaintiff would be at liberty to show that there was negligence so as to deprive the defendant of the benefit of the exceptions.||

**Limitation of Liability.**—A carrier “by land or inland navigation” (not being the owner of a railway or tramway) may limit his liability as insurer by special contract, signed by the owner of the property delivered, or by some person duly authorized in that behalf by such owner; but he will still be liable for loss or damage arising from the negligence or criminal act of himself, or his agents or servants.¶

**Statutory Limitation of Liability.**—By section 3 of the Carriers’ Act, 1865, carriers “by land or inland navigation” are not liable (except to the extent of one hundred rupees) for loss or damage to property of the description mentioned in the schedule to the Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.

**Carriers by Sea.**—By the common law the owners and masters of *general* vessels, whether engaged in the coasting trade or on sea-voyages, are common carriers,\*\* and are in general liable to the same duties as common carriers by land; that is to say, they are bound to re-deliver goods delivered into their charge, the act of God and the Queen’s enemies only excepted. But this liability is invariably

\* *Rice v. Bazendale*, 7 H. and N. 96; 30 L. J., Ex., 371; *British Columbia Sawmill Co. v. Nettleship*, L. R., 3 C. P. 499; 37 L. J., C. P., 235.

† *Collard v. S. E. Ry. Co.*, 7 H. and N. 79; 30 L. J., Ex., 398.

‡ *Horne v. Midland Ry. Co.*, L. R., 7 C. P., 583; L. R., 8 C. P. 181.

§ Carriers’ Act, 1865, s. 9; Railway Act, 1879, s. 13.

|| *Shetliff v. Scott*, 22 W. R. 39.

¶ Carriers’ Act, 1865, ss. 6 and 8.

\*\* *Morse v. Blue*, 2 Lev. 69; *Bennett v. P. and O. Steamboat Co.*, 6 C. B. 775; *Nugent v. Smith*, 1 C. P. D. 19; 45 L. J., C. P., 19; *B. I. S. N. Co. v. Hajee Mahomed*, L. R., 3 Mad. 107.



further limited by the terms of the bill of lading, as well as by certain sections of the Merchant Shipping Acts. By section 503 of the Merchant Shipping Act, 1854, the owner of a sea-going ship is not liable to make good, to any extent whatever, any loss or damage that may happen, without his actual fault or privity, to goods by reason of fire happening on board; nor is he liable for loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones by reason of robbery, or embezzlement, or theft, unless the shipper at the time of shipping the same declared in writing to the master or shipowner their true nature and value. This applies to British ships only.\* Again, by section 54 of the Merchant Shipping Act Amendment Act, 1862, it is enacted that the owners of any ship, *whether British or Foreign*, shall not, in cases which occur without their fault or privity, be answerable in damages (1) in respect of loss of life or personal injury to an amount exceeding *in the aggregate* fifteen pounds for each ton of their ship's tonnage; nor (2) in respect of loss or damage to ships, goods, merchandise, or other things, to an amount exceeding in the aggregate eight pounds for each ton of the ship's tonnage. These provisions of the Act of 1862 have been held not to extend to protect the owner for damage caused by delay.†

**Mode of Ascertaining Tonnage.**—The basis for tonnage adopted in the Merchant Shipping Act, 1854,‡ is a roomage or space-ton of 100 cubic feet, and the tonnage is the roomage, or internal cubic capacity, of the ship below her uppermost deck, and of permanent closed-in spaces on her uppermost deck, available for cargo, stores, passengers, or crew, ascertained by the formula known as "Sterling's rule." The aggregate cubic space in the ship thus ascertained (designated in units of 100 cubic feet) constitutes her *gross* tonnage. The nett or register tonnage upon which (with slight exceptions) all tonnage dues and charges on ships are levied, is ascertained, in the case of sailing vessels, by deducting from the gross tonnage the tonnage-spaces exclusively appropriated to the accommodation and use of the crew. The provisions of the Act of 1854 in respect of crew-spaces have been modified and extended by the Merchant Shipping Act Amendment Act, 1867, which provides that crew-spaces may be deducted from tonnage, wherever situated, provided certain conditions as to space, light, ventilation, and other sanitary arrangements, be complied with to the satisfaction of a surveyor of the Board of Trade; and that the space be kept free from goods and stores of any kind, not being personal property of the crew in use during the voyage. For a steam-vessel (in addition to crew-space deducted) the gross tonnage is further reduced by allowance for space occupied by and necessary for propelling power.§

**Distribution of Amount of Liability.**—When several claims are made or apprehended in respect of liability for damages for loss coming under section 54 of the Merchant Shipping Act, 1862, the Admiralty Court may entertain proceedings

\* *Cope v. Doherty*, 2 DeGex. and I. 614; 29 L. J., Ch., 600.

† *L. & S. W. Ry. Co. v. James*, L. R., 8 Ch. 241.

‡ *Ss.* 20-24.

§ See the *Franconia*, 3 C. P. D. 164.

at the suit of the owner for the purpose of determining the amount of such liability, and for the distribution of such amount rateably amongst the several claimants; and the Court has power to stop all actions and suits pending in any other Court in relation to the same subject-matter.\*

**Railways—Limitation of Liability.**—Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, sections 151 and 161, in the case of loss, destruction, or deterioration of, or damage to, property, shall, in so far as it purports to limit such obligation or responsibility, be void, unless (1) it is in writing, signed by, or on behalf of, the person sending or delivering such property; and (2) is otherwise in a form approved by the Governor-General in Council.†

In reference to the above provision of the Railway Act, 1879, in a recent case.‡ Mitter, J., said: "This section (10) does not say that the provisions of section 151 of the Indian Contract Act, 1872, shall be the *measure* of responsibility of a carrier by railway. It merely provides that, if he intends to reduce it below that provided by section 151 of the Indian Contract Act, he must comply with the provisions of clauses (a) and (b) of section 10 of the Indian Railways' Act, 1879. The section does not declare what shall be the measure of his liability, but lays down the particular mode in *which alone* he can reduce it below a certain degree. The section in question does not say that in the absence of the special contract referred to therein, that liability shall not be regulated by the rule of the English common law on the subject."

**Railways—Statutory Limitation of Liability.**—Carriers by railway are not liable for loss, destruction, or deterioration of, or damage to, property mentioned in Schedule II. of the Railway Act, 1879, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge, has been accepted by some railway-servant specially authorized in this behalf.§

If, after declaration made by the sender of the accepted article entitling the Railway Company to receive an increased charge, the goods are carried at the ordinary rates, the sender would be entitled to recover in case of loss.¶

To establish the liability of a Railway Company in the case of excepted articles the declaration must be made in such a manner as to intimate that the sender invites the Company to undertake the special risk, and is willing to pay the special rates;

\* Merchant Shipping Act, 1854, s. 514; Admiralty Court Act, 1861 (24 Vic., c. 10); and see *In the matter of the ship Portugal*, 6 B. L. R. 323, where it was held that the Stat. 24 Vic., c. 10, extends to India.

† Railway Act, 1879, s. 10.

‡ *Moothora Kant Shaw v. I. G. S. N. Co.*, I. L. R., 10 Cal. at p. 192.

§ Railway Act, 1879, s. 11.

¶ *Muthaya V. Chetti v. S. I. Ry. Co.*, I. L. R., 5 Mad. 208.

and the conditions of the section are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk.\*

**Government as Carriers.**—In the definition of common carriers in the Carriers' Act, 1865, the Government, for some reason or other, are excluded from that category; which would seem to mean one of two things—either that they were not to be subject to the duties or liabilities of common carriers, or that, being common carriers, they were not to share in the benefit conferred by that Act.†

**Liability of Carriers who are not Common Carriers.**—The liability of a carrier for reward, who is not a common carrier, is regulated by sections 151 and 152 of the Contract Act, 1872.‡ A foreign company are not common carriers.§

**Limitation.**—In a suit against a carrier for compensation for losing or injuring goods, two years from the time of the loss or injury.||

In a suit for delay in delivering goods, two years from the time when the goods ought to be delivered.¶ This applies to common carriers.\*\*

In suits against carriers for not delivering, article 115 of Act XV. of 1877 applies, viz., three years from the time when the contract is broken.††

### Form No. 280.

#### FOR LOSS OF LUGGAGE.

Plaintiff states:—

1. That on the       day of       18       , the defendant was a common carrier of passengers and their baggage by (coach) from  
to       for hire.

2. That on that day he received into his (coach) the plaintiff with his baggage, to wit (designate baggage), of the value of Rs.       , to be carried from the said       to       for Rs.       , then paid to the defendant.

3. That the defendant did not use proper care therein, but by the negligence and improper conduct of him and his servants the said baggage was wholly lost.

\* *Muthaya Chetti v. S. I. Ry. Co.*, I. L. R., 5 Mad. 208.

† *Per Garth, C.J.*, in *Moothoora Kant Shaw v. I. G. S. N. Co.*, I. L. R., 10 Cal. at p. 187.

‡ *Mackilloan v. Compagnie des Messageries Maritimes*, I. L. R., 6 Cal. 227.

§ *Mackilloan v. Compagnie des Messageries Maritimes*, *supra*.

|| Limitation Act, 1877, art. 30.

¶ Limitation Act, 1877, s. 31.

\*\* *B. I. S. N. Co. v. Hajee Mahomed*, I. L. R., 3 Mad. 107.

†† *B. I. S. N. Co. v. Hajee Mahomed*, *supra*.

**Liability of Carriers for Loss of Luggage.**—There has been a great conflict of authorities on the question of the extent of a common carrier's responsibility for the luggage of passengers; \* but it seems to be settled that they are liable as insurers for luggage which is taken charge of entirely by them, as when luggage is placed in a van,† but that they are only liable for negligence, and not as insurers, in the case of luggage which is, at the passenger's request, or with his consent, placed in the same carriage in which he travels, or is about to travel.‡

It is immaterial who buys the ticket; and therefore a person whose ticket has been taken and paid for by another may sue in his own name.§

**Railways—Liability for Luggage.**—A carrier by railway shall in no case be answerable for loss, destruction, or deterioration of, or damage to, any passenger's luggage, unless a railway-servant has booked, and given a receipt for, the same.¶

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Form No. 281.

FOR NEGLIGENCE IN LOADING CARGO.

Plaintiff states :—

1. That on the       day of       18       , at the port of       , the defendant was the master and owner of a certain vessel known as the       , then lying at the said port, and the plaintiff caused to be delivered to him (designate the goods) the property of the plaintiff, of the value of Rs.       , to be by the defendant safely and securely loaded on board the said vessel at       for a reasonable reward to be paid to the said defendant therefor; and the defendant received the said goods for that purpose.

2. That the defendant, by himself and his servants, conducted so carelessly and improperly the loading of the said goods on board the said vessel, that by their negligence and improper conduct the goods were broken and injured, and a part thereof wholly destroyed.

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\* See *Bergheim v. G. E. Ry. Co.*, 3 C. P. D. 221; 47 L. J., C. P., 318, where all the authorities are reviewed.

† *Bergheim v. G. E. Ry. Co.*, *supra*; *Cohen v. S. E. Ry. Co.*, 2 Ex. 253, 259; 46 L. J., Ex., 417.

‡ *Bergheim v. G. E. Ry. Co.*, *supra*; *Talley v. G. W. Ry. Co.*, L. R., 6 C. P. 44; 40 L. J., C. P., 9.

§ *Marshall v. York and Berwick Ry. Co.*, 11 C. B. 655.

¶ *Railway Act, 1879, s. 12.*

## Form No. 282.

## FOR NEGLIGENCE IN UNLOADING.

Plaintiff states :—

1. That on the       day of       18       , at the port of       , the defendant was master and owner of a certain vessel known as the       , then lying at the said port, and the plaintiff caused to be shipped on board the said vessel certain (describe the goods), the property of the plaintiff, of the value of Rs.       , which said goods were then in good order and condition ; in consideration whereof, and of the sum of Rs.       , then and there paid by the plaintiff to the defendant, the defendant then and there promised carefully and safely to carry and transport the said goods to       , and there safely to deliver them to,       or order, dangers of (state what) only excepted, and then and there received the said goods for that purpose.

2. That the said vessel afterwards safely arrived at       , and no (excepted perils) prevented the safe carriage or delivery of the goods.

3. That the defendant did not deliver the said goods to       ; and for want of due care in the defendant and his servants in unloading and delivering the said goods from the said vessel, they were broken, and injured, and were wholly lost to the plaintiff.

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CHAPTER IV.

## CONVERSION.

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Form No. 283.

## COMMON FORM.

Plaintiff states :—

1. That on the       day of       18       , at       , the plaintiff was in possession of certain goods (describe them).

2. That on that day the defendant converted the same to his own use, and wrongfully deprived the plaintiff of the use and possession of the same.

a nuisance, and be ground for an action for damages, or for an injunction, or both ;\* but such a suit must be based on the possession of the premises affected, and cannot be brought by a mere reversioner.†

**Damages.**—Where no substantial injury has been done, if it is the first time a suit is brought in respect of the nuisance, nominal damages only will be given ; but in a second or further suit exemplary damages will be given with a view to compelling its removal,‡ and an injunction may be obtained either in addition to, or instead of, damages.§

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### Form No. 290.

#### FOR OBSTRUCTING A WAY.

Plaintiff states :—

1. That he is, and at the time hereinafter mentioned was, possessed of a house in the town of .

2. That he was entitled to right of way from the said house over a certain field to a public highway, and back again from the said highway over the said field to the said house, for himself and his servants (with vehicles or on foot) at all times of the year.

3. That on the        day of        18        , defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles, or on foot, or in any manner) along that said way (and has ever since wrongfully obstructed the same).

4. (State special damage, if any.)

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### Form No. 291.

#### THE SAME.—ANOTHER FORM.

Plaintiff states :—

1. That the defendant wrongfully dug a trench and heaped up stones and earth in the public highway, leading from        to        , so as to obstruct it.

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\* *Land Mortgage Bank v. Ahmedbhoj Habibbhoj*, 1. L. R., 8 Bom. 35 ; *Crump v. Lambert*, L. R., 8 Eq. 409 ; *Waller v. Selfe*, 20 L. R., Ch., 433 ; *Sturges v. Bridgman*, 11 Ch. D. 852 ; 48 L. J., Ch., 785.

† *Land Mortgage Bank v. Ahmedbhoj Habibbhoj*, *supra*.

‡ *Battishill v. Reed*, 25 L. J., C. P., 290.

§ *Bowen v. Hall*, L. R., 6 Q. B 333 ; 50 L. J., Q. B., 805 ; 29 W. R. 367.

2. That thereby the plaintiff, while lawfully passing along the said highway, fell over the said stones and earth (or into the said trench), and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

**Easement Defined.**—An easement is the right which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient, to compel the owner thereof to permit something to be done, or to refrain from doing something, on such tenement for the advantage of the former. An easement which involves a right to do certain acts upon the neighbouring land is called an affirmative easement, such as a right of way; and one which confers no right to do any acts upon the neighbouring land, but only gives a right to prevent the neighbouring owner from doing some acts upon his land, is called a negative easement, such as rights of light and air, and rights of support.

The word "easement" as used in the Limitation Act, 1877, has, by force of the interpretation clause (section 3), a very much more extensive meaning than the word bears in English law; it embraces what in English law is called a *profit à prendre*, that is to say, a right to enjoy a profit out of the land of another, and, therefore in India a prescriptive right of fishery is an easement.\*

**Easements how Acquired.**—When the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption and for twenty years, and where any way or watercourse, or any use of water, or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible, provided the right existed uninterruptedly to within two years before suit.†

The mode of acquiring an easement provided by the Limitation Act is not the only way in which an easement may be acquired; an easement may be acquired by implied grant or as an easement of necessity, or in the case of the use of a path not absolutely necessary to the enjoyment of land, but which might be necessary to its enjoyment in the state in which it was at the time of severance, there would be a presumption that the easement passed with the tenement.‡ So, where from time immemorial, and certainly more than twenty years prior to the date of the obstruction by the defendants, the plaintiff enjoyed the right of having an egress for his rain-water through a drain in the defendant's land, and the plaintiff more than two years after the date of the obstruction sued the defendants for the

\* *Chundee Churn Roy v. Shib Chunder Mundal*, I. L. R., 5 Cal. 945; 6 C. L. R. 269.

† Section 26, Limitation Act, 1877.

‡ *Charu Surnokar v. Dokoori Chunder Thakoor*, I. L. R., 8 Cal. 956; *Rajrup Koor v. Abdul Hossein*, I. L. R., 6 Cal. 394.

removal of the obstruction, it was held that, though under the circumstances the plaintiff had failed to prove a title acquired under section 26 of Act XV. of 1877, yet the plaintiff, having a title evinced by immemorial user, did not require the aid of that Act; and inasmuch as the obstruction complained of constituted a continuing nuisance, as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but, on the contrary, was saved by the express provision of section 23.\*

A right to the uninterrupted flow of water along a defined channel over the lands of another may exist independently of the provisions of the Limitation Act, and the Court may presume a grant of the easement from long user.†

The 26th section of the Limitation Act renders it necessary that the *enjoyment of the right claimed* should have continued till within two years before suit, but it says nothing as to any *actual user or exercise of the right* within the two years, and in the case of discontinuous easements, the section does not require that actual user is to continue during the whole period, and so long as the right is not interfered with when they did have occasion to use it, the enjoyment of the easement must be considered as continuing all the year round.‡

When the easement has been acquired under Limitation Acts which do not require that the right shall have been enjoyed to within two years of suit, the plaintiff is not affected by that provision in section 26 of Act XV. of 1877, and may bring his suit within twelve years from the date of interruption.§

**The Terms "Interruption" and "Abandonment" Explained.**—The term "interruption" means an obstruction or prevention of the user of the easement by some person acting adversely to the person who claims it. "Abandonment" as applied to easements means the voluntary and permanent relinquishment by the dominant owner of a right which he has actually acquired.||

**As of Right.**—Under the English common law there could be no acquisition of a prescriptive right of easement unless the enjoyment was of such a nature that a grant of an easement might be presumed to have been made; and this could not be presumed if the enjoyment was shown to have been against the consent of the owner of the servient tenement without his knowledge, or in pursuance of, and depending on, the license or permission of the owner on each occasion of user;¶

\* *Punja Kuwarji v. Bai Kuvar*, I. L. R., 6 Bom. 20.

† *Srinivasa Rau Sahab v. Secretary of State for India*, I. L. R., 5 Mad. 226; *Pborno Chunder v. Shurut Chunder*, 24 W. R. 228.

‡ *Per Garth, O.J.*, in *Koylaah Chunder Ghose v. Sonatun Chung Barovie*, I. L. R., 7 Cal. 132; see also *Sham Churn Auddy v. Tariney Churn Banerjee*, I. L. R., 1 Cal. 422; 25 W. R. 228.

§ *Sri Raja V. S. N. Raju Bahadur v. Sri Raja S. J. Raju Bahadur*, I. L. R., 5 Mad. 253.

|| *Sham Churn Auddy v. Tariney Churn Banerjee*, I. L. R., 1 Cal. 422; 25 W. R. 228; see also *Gale on Easements*, 2nd edition, 353; *Moore v. Rawson*, 3 B. & C. 332.

¶ See *Subbramaniya v. Ramachandra*, I. L. R., 1 Mad. 335.



but in this country, for the purpose of acquiring a right of way or other easement under section 26 of the Limitation Act, 1877, it is not necessary that the enjoyment of the easement should be known to the servient owner.\*

The words "as of right" mean as claiming a right thereto against all persons, and especially as against the owner of the servient tenement.† Mere permissive possession cannot be the basis of a right of prescription.‡

**Presumptions—Long User.**—Open user of another's land for the purpose of a road or footpath, if continued without interruption for a long time, and not attributable to permission or sufferance, induces the presumption that the user was of right.§ So where the party has exercised the right of passage of his surplus tank-water over the land of another, openly and uninterruptedly, year by year, for upwards of twenty years, a presumption arises that he has obtained the easement as of right.||

**Light and Air.**—There is a right at common law to the passage of a proper quantity of wholesome air to a house or land, and its stoppage is actionable as a nuisance.¶

The enjoyment by the plaintiff of light and air through apertures in the wall of his house, when it is open and manifest, not furtive and invisible, and when it is not had in such a wise as to involve the admission of any obstructive right in the owner of the servient tenement, is an enjoyment "as of right" within the meaning of section 26 of Act XV. of 1877.\*\*

When a person who has a right to light from a certain window opens a new window or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old; but if he cannot obstruct the new without obstructing the old, he must submit to the burden.††

Where plaintiff pulled down the old house, and built a new one on the same ground, it was held that any prescriptive right which the old house might have conferred disappeared with the construction of the new one.‡‡

**Fisheries—Definitions.**—A common fishery is a public fishery, i.e., a fishery open to the public; a free fishery is where several specified persons have equal rights of fishing in the same waters; a common fishery is a species of private fisheries—a right in common with certain other persons of a certain class, as all the

\* *Arsan v. Rakhal Chunder*, 1. L. R., 10 Cal. 215.

† *Madhoosoodun Dey v. Bissonath Dey*, 15 B. L. R. 361; 23 W. R. 52.

‡ *Askar v. Ram Manik Roy*, 5 B. L. R. App. 12; *Futteh Ali v. Asgar Ali*, 71 W. R. 11.

§ *Mahomed Ali v. Joogul Ram Chunder*, 14 W. R. 124.

|| *Pooroo Chunder Chatterji v. Shurat Chunder Bhattacharjee*, 24 W. R. 228.

¶ *Webb v. Bird*, 10 C. B., N. S., 268; 30 L. J., C. P., 384; *Dalton v. Angus*, 44 L. J. 844.

\*\* *Mathuradas v. Baiamthi*, 1. L. R., 7 Bom. 523.

†† *Provabutty Dabee v. Mohendro Lall Bose*, 1. L. R., 7 Cal. 453.

‡‡ *Kalee Dass v. Bhooban Mohun*, 20 W. R. 185.

inhabitants of a certain village ; a several fishery is an exclusive right to fish in water covering land which belongs to another, and this right is not the less exclusive because other persons have also rights of fishing in the same waters, provided that the latter rights do not conflict with the former,—as, the exclusive right to take all fish, except oysters, is a several fishery, although another person has the right to take the oysters.\*

**Sea Fishery.**—The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property, but that right may, in certain portions of the sea, be regulated by custom. Members of the public exercising the common right to fish in the sea are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same ; and conduct which prevents another from a fair exercise of his equal right, if injury thereby results to him, is actionable.†

**Fishery—In Tidal Waters.**—Private right of fishery in a tidal navigable river must, if it exists at all, be derived from the Crown, and established by very clear evidence, as the presumption is against any such right ; indeed, it is doubtful whether any such right can exist at all.‡

**Ferry.**—Where the claim was for an exclusive right of ferry across a river running between plaintiff's and defendant's villages, it was held to be a claim to an easement governed by section 26 of the Limitation Act, 1877, so that the claimant was bound to prove a user of not less than twenty years.§

**Right of Way.**—A plaintiff's right of user of a pathway to certain premises cannot be affected by the existence of another path by which he may obtain access to the same premises.||

A general right of way includes a right to carry marriage and funeral processions,¶ and a right to use a passage, enjoyed as incident to a house, must in general include a right to use it for all ordinary household purposes, for the passage of mehters among the rest, but will not justify the cleaning of privies into such passage, or otherwise using it in connection with the cleaning of privies, except merely for the carriage of the nightsoil along it.\*\*

A right of passage for boats in the rainy season over a channel wholly in another's land is in respect of extent analogous to an ordinary right of way ; and

\* See *per* Westropp, C.J., in *Baban Mayaasha v. Naju Shrooncha*, I. L. R., 2 Bom. at pp. 44-46.

† *Baban Mayaasha v. Naju Shrooncha*, *supra*.

‡ *Prosunno Coomar Sircar v. Ram Coomar Parovey*, I. L. R., 4 Cal. 53.

§ *Parmeshari Prosad Narain Singh v. Mahomed Syed*, I. L. R., 6 Cal. 606 ; 7 C. L. R. 504.

|| *Mokocondonath v. Shib Chunder*, 22 W. R. 302.

¶ *Lokinath Gossamee v. Monmohun Gossamee*, 20 W. R. 293.

\*\* *Chunder Coomar v. Koylash Chunder*, I. L. R., 7 Cal. 665.

the servient owner may narrow the channel so long as he does not prevent the dominant owner from exercising his right as he has always been accustomed to:° such a right must be claimed in a particular direction to be valid.†

**Custom.**—Where the plaintiffs sued to restrain defendants from fishing in certain bhils, and the defendants claimed the right by custom for the inhabitants of certain villages to fish therein, it was held that such a custom would be unreasonable ‡

**Limitation.**—In suits for obstructing a way, three years from the date of the obstruction.§

### Form No. 292.

#### FOR DIVERTING WATER FROM A MILL.

Plaintiff states :—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a stream known as the \_\_\_\_\_ in the village of \_\_\_\_\_, district of \_\_\_\_\_.

2. That by reason of such possession the plaintiff was entitled to the flow of the said stream for working the said mill.

3. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the defendant, by cutting the bank of the said stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. That by reason thereof, the plaintiff has been unable to grind more than \_\_\_\_\_ sacks per day, whereas, before the said diversion of water, he was able to grind \_\_\_\_\_ sacks per day.

**Watercourse.**—Where water flows in its natural course from somewhere outside A's land, through it, and onwards to other peoples' land, A is not entitled to stop the flow by an embankment across it, unless he can make out some special right to do so. Such course is a part of the natural condition of the land, and the flow of the water over it, when it occurs, is a natural incident.||

When plaintiffs, the inhabitants of a village holding immediately from Government, had enjoyed the use of the water of a certain river for upwards of 280 years, and Government interfered with their use of the same, it was held that Government had no right of interference, neither as riparian proprietors (supposing them to be such), since the right to the enjoyment of the water of a river belongs to the

\* *Doorga Churn Dhar v. Kally Churn Sen*, I. L. R., 7 Cal. 145.

† *Doorga Churn Dhar v. Kally Churn*, *supra*.

‡ *Lutchmaseput Singh v. Sadaulla Nuahyo*, I. L. R., 9 Cal. 698.

§ Art. 37, Limitation Act, 1877.

|| *Baboo Churnroo v. Mullick Khyrut*, 18 W. R. 525.

occupant of the river-bank, whatever the nature of his tenancy, nor by any other imaginary rights existing in the Government as such, since if any such rights ever existed, the long user for upwards of 280 years of the water of the river would be amply sufficient to justify a presumption of an original *animus dedicandi* in the Government.\*

**Right to Passage of Water in Defined Channel.**—Where plaintiff established that, for a long series of years, the water from his lands had been accustomed to escape in a particular direction, and by certain separate passages across the defendant's land, the defendant could not do any thing which would interfere with the plaintiff's rights in this respect.†

The right to an easement in the flow of water through an artificial watercourse is as valid against the Government as it is against a private owner of land.‡

**Limitation.**—In suits for compensation for diverting a watercourse, three years from the date of the diversion.§

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### Form No. 293.

#### FOR OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

Plaintiff states :—

1. That he is, and at the time hereinafter mentioned was, possessed of certain lands (describe them), and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. That on the        day of        18        , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

**Right to use of Water for Irrigation : How Acquired.**—The right to have water for irrigation-purposes flowing from a reservoir on a neighbour's land through artificial watercourses must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin ; such a right may be presumed from the time, manner, and circumstances under which the easement has been enjoyed.¶

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\* The First Assistant Collector of Nasick v. Shamji Daarath, 1. L. R., 7 Bom. 209.

† Imam Ali v. Poreah Mundul, 1. L. R., 8 Cal. 468.

‡ Ponnusawmi Tevar v. The Collector of Madura, 5 Mad. H. C. R. 6.

§ Art. 38, Limitation Act, 1877.

¶ Ramessur Persad Narain Singh v. Koonj Behari Pattuck, 1. L. R., 4 Cal. 633; L. R., 6 I. A. 33; L. R., 4 App. Cas. 121.

So, where plaintiff, who in 1860 entered into an agreement for the lease from Government of a piece of land, having received possession, opened an artificial channel for conveyance of water, for the use of his estate, upon an adjoining piece of Government waste-land, and in 1865 received a formal lease, and subsequently, in 1874, a lease of this waste-land was granted to defendant, it was held that the flow of water in the channel having existed as an apparent and continuous easement in fact at the time of the execution of the lease in 1865, a right to it passed by implication under that lease, and the plaintiff was accordingly entitled to it; and that defendant, whose lease was subject to that right, was not entitled to interrupt the flow, but that he might use the water in a reasonable manner as it flowed through his land.\*

**Limitation.**—In suits for compensation for obstructing a watercourse, three years from the date of the obstruction.†

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**Form No. 294.**

**FOR ERECTING A DAM ABOVE PLAINTIFF'S DAM.**

Plaintiff states :—

1. That on the       day of       18       , and ever since that day, the plaintiff has been in the actual possession of a grist-mill, situated on (state what stream), in the district of       , together with a dam, to raise a head of water as high as should be necessary for said mill, and of the right to have the whole water of said stream, without obstruction or impediment, flow into and upon the pond for the benefit of said mill, as ancient rights and privileges, appurtenant to said mill.

2. That the defendant did, on the       day of       18       , erect a new dam across the said stream, above the plaintiff's dam aforesaid, within the limits of the plaintiff's pond and ground, and thereby cut off part of his said pond, backed the water above, and stopped its natural course as it anciently used to run; and that he still continues his new dam and obstruction, thereby frequently stopping the water from reaching the plaintiff's mill, and obliging the same to stand idle for want of water; and at other times letting out the water through said new dam so suddenly, and in such large quantities, as to tear away part of the plaintiff's said dam; whereby the plaintiff's mill aforesaid has become useless and of no value.

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\* *Morgan v. Kirby*, 1. L. R., 2 Mad. 47.

† Art. 37, Limitation Act, 1877.

Form No. 295.

FOR POLLUTING WATER UNDER PLAINTIFF'S LAND.

Plaintiff states:—

1. That he is, and all times hereinafter mentioned was, possessed of certain land (describe it) and of a certain well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water which flowed and ran into the said well to supply the same to flow or run without being fouled or polluted.

2. That on the       day of       18       , defendant wrongfully fouled and polluted the said well and the said water therein, and the said springs and streams of water which flowed into the said well.

3. That by reason of the premises the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the said well and water.

Pollution of Watercourse.—Suit lies for compensation for polluting a stream to the injury of persons having a right to the use of the water.\*

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CHAPTER VII.  
SLANDER OF TITLE.

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Form No. 296.

COMMON FORM.

Plaintiff states:—

1. That on the       day of       18       , he was the owner of (state what property) situate in       (describe it particularly).

2. That on that day, at       , the defendant, maliciously and without cause, spoke in the presence of A B and others (name them), the following words concerning the plaintiff and his property (insert the exact language with innuendoes).

3. That the said words were false.

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\* Murgatroyd v. Robinson, 7 E. and B. 391; 26 L. J., Q. B., 233.

4. That said A B (or others, naming them) was then and there negotiating for the purchase of said premises, and that by reason thereof said A B (or others) were dissuaded from making such purchase.

5. That by reason of said words, the said A B refused, and still refuses, to purchase the said property from the plaintiff, and the plaintiff has been, by reason thereof, unable to sell the same, and has been otherwise greatly injured thereby.

**Necessary Averments.**—Plaintiff must allege and prove that the slander is false, that it was spoken or published maliciously, and that he has suffered damage.\*

## CHAPTER VIII.

### TRESPASS.

#### Form No. 297.

#### TRESPASS ON LAND.

Plaintiff states :—

1. That at the time hereinafter mentioned he was, and now is, the owner, and lawfully in the possession, of a piece of land (describe it).

2. That on the                day of                18   , the defendant was the owner in possession of, and chargeable with the care of, certain animals, to wit, sheep.

3. That on that day said animals ran and trespassed upon said lands, ate up, injured, and destroyed the grain and verdure growing thereon, of the value of Rs.

**Trespass on Land Defined.**—Trespass to land is a wrongful and unwarrantable entry upon the land of another person.† Every entry upon land in the occupation of another is a trespass, unless it can be justified in the execution of some legal or personal authority, or some incorporeal right. The act need not be intentional, and it is not essential in order to maintain a suit that damage should have really been done.

**Parties.**—The person in actual occupation should sue, but if the reversionary interest of a landlord is injured by the trespass, as when the damage done is permanent, and lessens the value of the property, then he may sue either with the tenant or separately.

**Abetment of Wrong.**—In suits for compensation for wrongs, those who abet the tortuous acts are equally liable with those who commit the wrong.‡

\* *Malachy v. Soper*, 3 Beng. N. C. 371.

† *Broom's Coins*. 769.

‡ *Kashee Nath Keer v. Deb Kristo*, 16 W. R. 240.

**Limitation.**—In suits for compensation for trespass upon immoveable property, three years from the date of the trespass.\*

**Form No. 298.**

**FOR INJURING TREES.**

Plaintiff states :—

1. (As in preceding form.)

2. That on the       day of       18       , the defendant entered upon the said land, and, without the leave of the plaintiff, cut down trees (designate the number and kind of trees), of the value of Rs.       , whereby plaintiff lost said trees, and the said land was greatly damaged and lessened in value, to the amount of Rs.       .

**Form No. 299.**

**FOR TREADING DOWN GRAIN AND CUTTING TIMBER.**

Plaintiff states :—

1. (As in form No. 297.)

2. That on the       day of       18       , the defendant, by his servants and agents, entered upon the said land and trod down the grain then growing thereon, and cut down and carried away       trees and timber of the plaintiff of the value of Rs.       , and converted and disposed of the same to his own use.

**Form No. 300.**

**TRESPASS TO GOODS.**

Plaintiff states :—

1. That on the       day of       18       , at       , the defendant unlawfully took from the possession of the plaintiff, and carried away (describe the goods) of the value of Rs.       , the property of the plaintiff, and still unlawfully detains the same from the plaintiff (or, when the possession was regained,—and unlawfully detained the same from the plaintiff for the space of       ).

2. That by reason of such unlawful taking and detention of the said goods, the plaintiff was compelled to pay Rs.       to       to procure the return of the same, and also Rs.       for storage.

\* Art. 39, Limitation Act, 1877.



**When Suit Lies.**—The plaintiff must have the actual or constructive possession of the goods in order to maintain a suit for trespass, or at least a legal right to the possession;\* the fact of possession is *prima facie* evidence of the right to possession, and is good against any one who cannot show a better title, or authority under a better title.† A special possession such as that of a bailee is sufficient to support this suit.‡

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### Form No. 301.

#### FOR ENTERING HOUSE AND SEIZING GOODS THEREIN.

Plaintiff states:—

1. That on the       day of       18       , the plaintiff was a merchant residing at No.       , Street,
2. That on that day the defendant, by his servants and agents, broke and entered the plaintiff's said house, and took and carried away (enumerate articles) of the value of Rs.       , the property of the plaintiff, and converted and disposed of the same to his own use.
3. That by reason thereof the plaintiff has been deprived of the said       , and has been prevented from carrying on his said business as a merchant, and deprived of the profits thereof, amounting to Rs.       , which he would otherwise have earned.

**Liability of Judgment Creditor for Wrongful Seizure.**—Where a judgment creditor wrongfully attaches property of the plaintiff, in execution of his decree, he is liable for loss or damage, and the measure of damages will be the value of the property at the time of attachment.§

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### Form No. 302.

#### FOR MALICIOUS INJURY TO PROPERTY.

Plaintiff states:—

1. That on the       day of       18       , at       , the defendant, wilfully and maliciously, intending to injure the plaintiff, cut, broke, and mutilated certain (designate what), the property of the plaintiff, of the value of Rs.       , and greatly injured them, so that the plaintiff was compelled to expend Rs.       in repairing the same.

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\* Balme v. Hutton, 9 Bing. 471, 477.

† Elliot v. Kempe, 7 M. & W. 212.

‡ Collwill v. Reeves, 2 Camp. 575.

§ Goma Mahad Patil v. Gokaldas Khimji, I. L. R., 3 Bom. 74; partially dissenting from Musamat Subjan Bibi v. Sheikh Sawantalla, 3 B. L. R. 413.

CHAPTER IX.  
WASTE.

Form No. 303.

FOR WASTE BY LESSEE.

Plaintiff states :—

1. That on the      day of      18      , the defendant hired from him the house No.      in      street, in the town of      , for the term of      months.

2. That defendant occupied the same under such hiring.

3. That during the period of such occupation, the defendant greatly injured the premises (defaced the walls, tore up the floors, and broke down the doors ; or otherwise specify the injuries as far possible).

Wherefore plaintiff prays judgment for Rs.      compensation.

Form No. 304.

THE SAME—WITH PRAYER FOR INJUNCTION.

Plaintiff states :—

1. That the plaintiff is the absolute owner of (describe the property).

2. That the defendant is in possession of the same under a lease from the plaintiff.

3. That the defendant has cut down a number of valuable trees and threatens to cut down many more for the purpose of sale without the consent of the plaintiff.

Wherefore plaintiff prays judgment :—

1. That the defendant be restrained by injunction from committing or permitting any further waste on the premises.

2. For Rs.      compensation and the costs of suit.

**Waste Defined.**—Waste has been defined as a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disinheritance of him that has the reversion or remainder. Waste is of two kinds, *vis.*, voluntary or commissive waste, which consists in acts, as pulling down a house ; and permissive waste, which consists in omissions, as suffering a house to fall into decay.

Equitable waste is capricious or extravagant waste on the part of a tenant unimpeachable for waste, as pulling down a dwelling-house,\* or cutting down ornamental timber.†

**Liability of Lessee.**—A lessee is under an implied covenant to use the premises in a tenant-like manner,‡ and in the case of a farm to cultivate it in a husband-like manner,§ and according to the custom of the country in which it is situate.||

By clause (c) of section 108 of the Transfer of Property Act, 1882, a lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

**Mortgages.**—By section 166 of the Transfer of Property Act, 1882, a mortgagor is not liable for permissive waste, but he is liable for commissive waste as soon as the security becomes insufficient thereby; and a security is insufficient within the meaning of that section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half the amount for the time being due on the mortgage.

**Mortgagees.**—A mortgagee is bound to keep the premises in necessary repair out of the surplus rents, if there be such;¶ and he is liable for commissive waste if he does not apply the proceeds in sinking the principal and interest of his mortgage.\*

**Measure of Damages.**—In a suit for damages in respect of the value of trees cut down by the defendant, not as a wrong-doer, but as one having some claim of right to justify him, the computation of damages is not a matter of exact calculation, but must be left to the discretion of the Judge who hears the evidence.†

**Limitation.**—In a suit by a lessor for the value of trees cut down by his lessee contrary to the terms of the lease, three years from the time when the trees are cut down.‡

\* *Vane v. Barnard*, 2 Ver. 788.

† *Chamberlayne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549; *Downshire v. Sands*, 6 Ves. 107; *Wellesley v. Wellesley*, 6 Sim. 497.

‡ *Standen v. Christmas*, 10 Q. B. 135.

§ *Powley v. Walker*, 5 T. B. 373; *Horsefall v. Mathu Holt*, N. P. C. 7, 9.

|| *Lagh v. Hewitt*, 4 East 154.

¶ *Transfer of Property Act*, 1882, s. 76.

\* *Farrant v. Lovel*, 3 Atk. 723.

† *Forbes v. Meer Mahomed*, 1 W. R. 238.

‡ *Art. 108, Limitation Act*, 1877.

**Form No. 305.**

**BY REMAINDERMAN.**

**Plaintiff states :—**

1. That at the time of his death one A B was the absolute owner of (describe the premises).

2. That in his lifetime the said A B made his last will and testament, whereby he devised the said land to the plaintiff, subject, however, to a devise made in the same will, of the same lands, to the defendant for the term of        years.

3. That on the        day of        18        , at        , the said A B died.

4. That the defendant entered into possession of the said premises under the said will.

5. That on the        day of        18        , the defendant committed great waste on the said land (state acts of waste).

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**FOURTH DIVISION.**

**SUITS FOR POSSESSION OF SPECIFIC  
PROPERTY.**

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**CHAPTER I.**

**IMMOVEABLE PROPERTY.**

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**Form No. 306.**

**BY ABSOLUTE OWNER FOR POSSESSION.**

**Plaintiff states :—**

1. That on the        day of        18        , he was the absolute owner, and possessed, and entitled to the possession, of a piece of land called        , situate in the district of        , the Government revenue of which is Rs.        (or of the house No.        , in        Street, in the town of        , the estimated value of which is Rs.        .

2. That on that day the defendant, illegally and without right or title, ousted and dispossessed the plaintiff of the said premises, and now unlawfully withholds the possession thereof from the plaintiff.

3. That the value of the rents and profits of the said premises from the said            day of            18   , and while the plaintiff has been excluded therefrom by the defendant is Rs.           .

Wherefore plaintiff prays judgment:—

- 1 For possession of said premises;
- 2 For Rs.           , compensation for withholding the same;
- 3 For Rs.           , the value of the rents and profits thereof, and the costs of suit.

**Immoveable Property Defined.**—In the General Clauses Act, 1863, immoveable property is declared to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to any thing attached to the earth; and, for the purposes of the Registration Act, 1877, immoveable property is, by section 3 of that Act, defined as including lands, buildings, hereditary allowances, rights to ways, lights, ferries, or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, nor grass.

**Necessary Averments.**—The date of dispossession should be stated as accurately as possible,\* but it is not sufficient ground for dismissing a suit, that the exact date of dispossession stated in the plaint was not proved.† A possession on the part of one party, which is not shown to have commenced in wrong, can only be disturbed by distinct proof of a superior title in the other party.‡

**Onus Probandi.**—In suits for the possession of land, from which the plaintiff alleges that he has been dispossessed, the general rule is, that the burden of proof is upon the plaintiff to show possession and dispossession within twelve years,§ and this rule is not intended to be interfered with by the Privy Council in *Radha Gobind v. Inglis*.|| Evidence of possession within twelve years is not alone sufficient to throw upon the defendant the burden of proving his title to the land,¶ nor is it sufficient to entitle plaintiff to a decree,\*\* there must be evidence of dispossession by the defendant.†† Where the evidence is equally balanced, the presumption is in favour of the defendant.‡‡

\* *Boydonath Surmah v. Ojan Bibee*, 11 W. R. 238.

† *Boga Kolita v. Kayasta*, 24 W. R. 357.

‡ *Armugum Chetty v. Perriyanan*, 25 W. R. 81.

§ *Bhoonthath Chatterjee v. Kedarnath Banerjee*, I. L. R., 9 Cal. 125; *Mahomed Ali Khan v. Khaja Abdul Gunny*, I. L. R., 9 Cal. 774; 12 C. L. R. 257.

|| 7 C. L. R. 364.

¶ *Mahomed Ali Khan v. Khaja Abdul Gunny*, *supra*; *Debi Churn Boido v. Issur Chunder Manjee*, I. L. R., 9 Cal. 39; 11 C. L. R. 342; *Wise v. Amirunnissa Khatoon*, L. R., 7 I. A. 81; 6 C. L. R. 249.

\*\* *Irtaza Hossein v. Bany Mistry*, I. L. R., 9 Cal. 130; 11 C. L. R. 398.

†† *Mahomed Bux v. Abdool Kareem*, 20 W. R. 458.

‡‡ *Husee Mohun v. Kootassur Gope*, 24 W. R. 318.

**Mesne-profits.**—The definition of “mesne-profits” given in section 211 of the Civil Procedure Code is as follows: Mesne-profits of property mean those profits which the person in possession of such property actually received, or might with ordinary diligence have received, therefrom, together with interest on such profits. So, a person not actually cultivating, but receiving rents, is accountable, not only for the sums actually collected, but for what it might be supposed he could have collected;° and the usual rule is to ascertain what would be a fair and reasonable rent for the land, if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer;† and this, indeed, is the only rule on which to proceed where the person in wrongful possession has himself occupied and cultivated it;‡ especially if the cultivation is carried on at a great risk.§ But in other cases the wrong-doer is liable for the profits which would have arisen under a like occupation by the plaintiff, for the period that he was out of possession;|| and to determine the amount it will be sufficient to shew the profits for the years preceding dispossession, or afterwards;¶ less the collection charges, but with interest at six per cent per annum.°°

When the defendants have been in possession as wrong-doers, it lies upon them to shew what were the sums realized as rent during the time of their possession;†† and they are liable for the mesne-profits whether they enjoyed them instead of the plaintiff or not ‡‡

**Interest.**—Interest calculated upon yearly rests may, when claimed by the plaintiff in his plaint, be given as an essential portion of the damages which are recoverable by a person wrongfully kept out of possession of immoveable property.§§

**Sale Pendente Lite.**—Where the Transfer of Property Act, 1882, is in force, a sale of immoveable property made during the pendency of a suit concerning it, by a party to the suit, is void as against other parties to the suit;||| but where that Act does not apply, there is nothing to prevent a person from alienating his immoveable

\* *Thakoor Doss Roy Chowdhry v. Nobin Kisto Ghose*, 22 W. R. 127; *Baboo Lucky Narain Roy v. Kally Puddo*, 4 O. L. R. 60; I. L. R., 4 Cal. 883.

† *Rugho Nath Dobey v. Huttee Dobey*, 1 Agra H. C. R., Misc., 17.

‡ *Rani Asmut Kooer v. Maharani Inderjeet Kooer*, F. B. R. 1003; *Gunga Prosad v. Gujadhur Prosad*, I. L. R., 2 All. 651.

§ *Soudaminee Dabee v. Anundo Chunder Halder*, 13 W. R. 37.

|| *Teluck Chand Baboo v. Soudaminee Dossee*, 23 W. R. 108; *Mussamut Rookmee Kooer v. Ram Tuhul Roy*, 17 W. R. 156; *Nursingh Roy v. John Anderson*, 19 W. R. 125; 16 W. R. 21; *Gooroo Dyal Mundu v. Baboo Gopal Singh*, 24 W. R. 271; *Huruck Lall Saha v. Sreenibash Kurmoker*, 15 W. R. 423; *Promothonath Roy v. Trepoora Sood-duree Dabee*, 10 W. R. 463; *Bhyrnb Chunder Mojoomdar v. Haro Prosunno Buttacharjee Chowdhry*, 17 W. R. 257; *Lucky Narain v. Kally Puddo Banerjee*, I. L. R., 4 Cal. 882.

¶ *Bhawaneedeen Sahoo v. Mohun Sahoo*, 1 All. 273.

\*\* *Hurrodurga Chowdhraim v. Sharrat Soondery Dabee*, I. L. R., 4 Cal. 674.

†† *Brojendro Coomar Roy v. Madhub Chunder Ghose*, I. L. R., 8 Cal. 343.

‡‡ *Ghoogly Sahoo v. Chunder Pershad*, 21 W. R. 246.

§§ *Brojendro Coomar Roy v. Madhub Chunder Ghose*, I. L. R., 8 Cal. 343.

||| Section 52.

property previous to decree,\* and there is nothing in sections 23 and 24 of the Contract Act, 1872, to support the opinion that a sale, made with a view to defeat a probable execution, would be a sale with a fraudulent and unlawful object, and therefore void within those sections;† nor is the owner of property prevented from selling it even after decree, although he knows that the judgment-creditor is seeking to get process of execution against it.‡

**Voluntary Alienations.**—The Statute 27 Elizabeth, c. 4, provides that all voluntary conveyances, or leases of lands, tenements, or other hereditaments whatsoever, shall be void against subsequent purchasers for valuable consideration, with or without notice;§ the effect of which is, that, although a person may make a perfectly good voluntary conveyance to another of his land, yet, if he afterwards convey that land for value, even though the latter person knows of the prior voluntary conveyance, he will take in preference to it. A mortgagee and a lessee is a purchaser within the meaning of this Statute.|| Natural love and affection, although a good, is not a valuable consideration.¶

By the Statute 13 Elizabeth, c. 5, all gifts and conveyances of immoveable property, made for the purpose of defeating, hindering, or delaying creditors, are void against them, unless made *bond fide* upon valuable consideration to some person without notice of the fraud.

These Statutes are repealed wherever the Transfer of Property Act, 1882, applies; but the law on the subject has been substantially re-enacted by section 53 of that Act.

**Benami Purchases.**—Where the plaintiff sued to recover land of which he alleged he had been dispossessed, and the defendant, who was in possession, asserted that the plaintiff had bought the land *benami* for him, it was held that the burden of proving a *prima facie* case that the land belonged to the plaintiff was on him.\*\*

**Bona-fide Purchaser without Notice.—Onus Probandi.**—In a suit to recover possession, the onus is on defendant who pleads that he is a *bond fide* purchaser for value, without notice of plaintiff's title, to make out that plea.††

**Estoppel.**—It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he

\* *Per Phear, J.*, in *Grose v. Amirtamayi*, 4 B. L. R., O. C., 1.

† *Rajan Harji v. Ardeshir Hormusji*, 1. L. R., 4 Bom. 70.

‡ *Ram Burun v. Jankee Sahoo*, 22 W. R. 473.

§ *Williams, B. P.*, 13th edition, 79.

|| *Chapman v. Emery, Cowp. 279*; *Cracknall v. Janson*, 11 Ch. Div. 1.

¶ *Doe v. Manning*, 9 East 59.

\*\* *Huri Ram v. Raj Coomar Opadhya*, 1. L. R., 8 Cnl. 758.

†† *Bibee Jeebunissa v. Umul Chunder*, 18 W. R. 151; *Vaideen Seth Sarn v. Luckpathy Royjee*, S. P. C. J. 483.

had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to put him upon an inquiry, which, if prosecuted, would have led to a discovery of it.\*

**Advancement.**—The English doctrine of advancement is applicable in India as between a father and daughter both of English extraction, and living under English law. The *status* of the daughter, under an alleged *bond-fide* purchase made by her father for her advancement when a minor, cannot be set aside except by positive proof that the father merely made use of her name as he would that of any servant or stranger, retaining the beneficial interest in the property for himself.†

**Effect of Registration.**—See the notes under this head in the chapter on Foreclosure of Mortgages (Form No. 327).

**Correspondence Registration.**—Letters between the purchaser and vendor, whereby the acceptance of the purchaser's offer was conditional on his paying earnest-money, did not fall within clause 2 of section 17 of Act VIII. of 1871, and were admissible in evidence, as until the earnest-money was paid, no estate, legal or equitable, in the property, passed to the plaintiff;‡ and correspondence between A and B amounting to a contract for the purchase of a future interest in land did not require registration under Act XX. of 1866.§

**Appointment of Receivers Pendente Lite.**—The Court may, under section 503 of the Civil Procedure Code, and section 44 of the Specific Relief Act, 1877, appoint a receiver pending the trial of title to property, but will not do so ordinarily, nor unless a strong case has been shown that the property is in danger of being wasted, damaged, or alienated.

**Limitation.**—In possessory suits under section 9 of the Specific Relief Act, 1877, the period is six months from the time when the dispossession occurred.||

In a suit before a Court established by Royal Charter, by a mortgagee against a mortgagor for possession, thirty years from the time when any part of the principal or interest was last paid on account of the mortgage.¶

In a suit instituted in a Court not established by Royal Charter, by a mortgagee for possession of immoveable property mortgaged, twelve years from the time when the mortgagor's right to possession determines;\*\* this will apply whether the suit is against the mortgagor himself, or against a third party to whom the rights of the mortgagor have been transferred.

\* Ramcoomar Koondoo v. McQueen, 18 W. R. 166.

† Kishen Koomar v. Stevenson, 2 W. R. 141.

‡ Waman Bachmandra v. Dhondiba Krishaji, 1 L. R., 4 Bom. 127.

§ Port Canning Land Co. v. Smith, L. R., 1 I. A. 124; 21 W. R. 315; L. R., 5 P. C. 114.

|| Art. 3, Limitation Act, 1877.

¶ Art. 146, Limitation Act, 1877.

\*\* Art. 135, Limitation Act, 1877.



In a suit by a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale, twelve years from the time when the vendor is first entitled to possession.\*

In a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale, twelve years from the time when the judgment-debtor is first entitled to possession;† when the judgment-debtor was in possession at the date of sale, twelve years from the date of sale.‡

In suits for possession of immoveable property, when the plaintiff, while in possession, has been dispossessed, or has discontinued the possession, twelve years from the date of dispossession or discontinuance.§

In suits for possession of immoveable property, or any interest therein, not otherwise provided for, twelve years from the time when the possession of the defendant becomes adverse to the plaintiff.||

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### Form No. 307.

#### BY LANDLORD AGAINST TENANT CLAIMING RIGHT OF RE-ENTRY FOR BREACHES OF CONTRACT.

Plaintiff states:—

1. That on the       day of       18   , the plaintiff, by an instrument in writing, let to the defendant a house and premises No.       street, in the town of       , for a term of       years from, the       day of       18   , at a monthly rent of Ra.       .

2. That by the said instrument the defendant contracted to keep the said house and premises in good and tenantable repair.

3. That said instrument also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any promise on his part to be performed.

4. That on the       day of       18   , a month's rent became due, and on the       day of       18   , another month's rent became due; and on the       day of       18   , both had been in arrear for twenty-one days, and both are still due.

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\* Art. 136, Limitation Act, 1877.

† Art. 137, Limitation Act, 1877.

‡ Art. 138, Limitation Act, 1877.

§ Art. 142, Limitation Act, 1877.

|| Art. 144, Limitation Act, 1877.

5. That on the       day of       18       , the house and premises were not, and are not now, in good and tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

Wherefore plaintiff prays judgment :—

1. For possession of the said house and premises ;
2. For Rs.       , for arrears of rent ;
3. For Rs.       , compensation for the defendant's breach of his contract to repair ;
4. For Rs.       , for the occupation of the house and premises from the       day of       18       to the day of recovering possession ;
5. And all costs of suit.

**Limitation.**—In suits by a landlord to recover possession from a tenant, twelve years from the time when the tenancy is determined ;\* in a like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition, twelve years from the time when the forfeiture is incurred or the condition is broken.†

In suits by a remainderman, or reversioner (other than a landlord), or a devisee for possession of immoveable property, twelve years from the time when his estate falls into possession.‡

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### Form No. 308.

#### BY THE TENANT AGAINST LANDLORD.

Plaintiff states :—

1. That one E F is the absolute owner of a piece of land in the town of       , known as       , the estimated value of which is Rs.       .
2. That on the       day of       18       , the said E F let the said premises to the plaintiff for       years from the       day of       18       .
3. That the defendant withholds the possession thereof from the plaintiff.

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\* Art. 139, Limitation Act, 1877.

† Art. 143, Limitation Act, 1877.

‡ Art. 140, Limitation Act, 1877.

## CHAPTER II.

### MOVEABLE PROPERTY.

#### Form No. 309.

#### FOR MOVEABLES WRONGFULLY TAKEN.

Plaintiff states :—

1. That on the       day of       18       , the plaintiff owned (or was possessed and entitled to the possession of) one hundred barrels of flour, the estimated value of which is Ra.

2. That on that day, at       , the defendant took and carried away the same.

Wherefore plaintiff prays judgment :—

1. For the possession of the said goods, or for Ra.       , in case such possession cannot be had ;

2. For Ra.       , compensation for the detention thereof, and the costs of suit.

**Decree for Specific Moveables : How Enforced.**—Unlike the rule of English law, the defendant has no option to pay the damages, and retain the goods, for by section 259 of the Civil Procedure Code the actual delivery may be enforced by seizure of the goods, and delivery thereof to the plaintiff, and also by the imprisonment of the judgment-debtor, or by the attachment of his property.\*

**Limitation.**—In suits for specific moveable property lost, or acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, three years from the time when the person having right to the possession of the property first learns in whose possession it is,† in suits for other specific moveable property, or for compensation for wrongfully taking or injuring the same, three years from the time when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.‡

In suits by a principal against agent for moveable property received by him and not accounted for, three years from the time when the account is, during the continuance of the agency, demanded and refused, or when no such demand is made when the agency terminates.§

In suits against a depository or pawnee to recover moveable property deposited or pawned, thirty years from the date of the deposit or pawn.||

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\* See *Kashee Nath Kooer v. Deb Kristo*, 16 W. R. 240.

† Art. 48, Limitation Act, 1877.

‡ Art. 49, Limitation Act, 1877.

§ Art. 89, Limitation Act, 1877.

|| Art. 145, Limitation Act, 1877.

Form No. 310.

FOR MOVEABLES WRONGFULLY DETAINED.

Plaintiff states :—

1. That on the      day of      18      , the plaintiff owned (or state facts showing a right to the possession) the goods mentioned in the schedule hereto annexed, the estimated value of which is Rs.      .

2. That from that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. That before the commencement of this suit, to wit, on the day of      18      , the plaintiff demanded the same from the defendant, but he refused to deliver them.

Wherefore plaintiff prays judgment :—

1. For possession of the said goods, or for Rs.      , in case such possession cannot be had ;

2. For Rs.      , compensation for the detention thereof and the costs of suit.

**When Suit Lies.**—A suit lies for the recovery of specific goods to the immediate possession of which plaintiff is entitled, and for damages, and it is immaterial by what means the defendant obtained possession, as the gist of the suit is the wrongful detention ; but the goods must be distinguishable from other property of a like kind, and therefore this suit cannot be brought for money or grain in bulk.

**Measure of Damages.**—The amount to be paid in the alternative for the goods must be fixed with reference to the market-value of such goods (if any) or otherwise their actual value to the owner, at the time when the detention began, or at the time of trial, whichever is highest : for the wrong being the detention, that is a continuous act reaching down to the time of trial ;\* and the market-price may be that at the principal or only place of sale for such goods less the cost of carriage there.†

**Married Women.**—Under section 7 of the Married Women's Property Act, 1874, suit lies by wife against her husband for wrongfully detaining her separate property.‡

**Voluntary Alienations.**—By Statute 13 Elizabeth, c. 5, all gifts or conveyances of moveable property made for the purpose of defeating, hindering, or

\* *Franer v. Gaudet*, L. R., 6 Q. B. 204; *Greening v. Wilkinson*, 1 C. & P. 625; *Archer v. Williams*, 5 C. B. 318; 2 *Selwyn's N. P.* 1378; *Mayne on Damages*, 3rd edition, 339 et seq.; *Sedg. on D.* 550, 571-3.

† *Bombay-Burmah Trading Corporation v. Meer Mahomed*, L. R., 5 I. A. 134; I. L. R., 4 Cal. 116.

‡ *Harris v. Koylas Chunder Bandopadhyay*, I. L. R., 1 Cal. 285.

delaying creditors, are void against them, unless made *bond fide* upon valuable consideration to some person without notice of the fraud. The mere fact of any conveyance or assignment being voluntary will not necessarily render it bad under this Statute ; but the fact of its voluntary nature will cause suspicion to attach to it.

Where the Transfer of Property Act, 1882, applies, this Statute is repealed, and, so far as moveable property is concerned, its provisions have not been re-enacted.\*

### Form No. 311.

#### FOR GOODS TAKEN FROM POSSESSION OF BAILEE.

Plaintiff states :—

1. That at the time hereinafter mentioned, the plaintiff was, and still is, the owner of (describe the goods), which goods were then in the possession of A B, with whom the plaintiff had left the same for safe keeping (or otherwise).

2. That on the       day of       18       , at       , the defendant wrongfully took said goods from the possession of said A B, and still detains the same from the plaintiff, without his consent.

3. That before this suit, to wit, on the       day of       18       , the time which the said A B was safely to keep said goods had expired, and thereupon the plaintiff become entitled to the immediate and exclusive possession of said goods.

Wherefore plaintiff demands judgment :—

1. For the recovery of the possession of said goods, or, in case a delivery cannot be had, for the sum of Rs.       , the value thereof ;
2. For Rs.       , damages, and for costs of suit.

Who may Sue.—Either the bailee or bailor may sue a third person who deprives the bailee of the use or possession of the goods bailed.†

### Form No. 312.

#### AGAINST FRAUDULENT PURCHASER AND HIS TRANSFEREE, WITH NOTICE.

Plaintiff states :—

1. (Allege fraud or misrepresentation.)
2. That the plaintiff was thereby induced to sell and deliver to the said C D one hundred boxes of tea, of the value of Rs.       .

\* See, however, s. 24, Insolvent Act (11 & 12 Vic., c. 21).

† Contract Act, 1872, s. 180.

3. That the said representations were false, and were then known by the said C D to be so (or negative the words of the representation).

4. That the said C D afterwards transferred the said goods to the defendant E F without consideration (or who had notice of the falsity of the representation).

Wherefore plaintiff prays judgment:—

1. For possession of the said goods, or for Rs.                      in case such possession cannot be had;
2. For Rs.                      compensation for the detention thereof;
3. For costs of suit.

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## FIFTH DIVISION.

### SUITS FOR SPECIAL RELIEF.

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#### CHAPTER I.

#### ABATEMENT OF NUISANCE.

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##### Form No. 313.

##### COMMON FORM.

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Plaintiff states:—

1. That the plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of the house No.                      , in                      Street, in the town of                      .

2. That the defendant is, and at all the said times was, the absolute owner of a plot of ground in the same street adjoining plaintiff's said property.

3. That on the                      day of                      18                      , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there, and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff.

4. That the plaintiff has been compelled, by reason of the premises, to abandon the said house, and has been unable to rent the same.

Wherefore plaintiff prays judgment that the said nuisance be abated.

## Form No. 314.

## ANOTHER FORM.

Plaintiff states :—

1 & 2. (As in preceding form.)

3. That on or about the      day of      18      , the defendant erected on his said plot a factory, and put a steam trip-hammer therein and ever since operated said factory for manufacturing purposes, and, in so doing, has used said trip-hammer almost daily.

4. That the use of said trip-hammer makes so loud a noise as to render it impossible, while it is being operated, to hear ordinary conversation in the plaintiff's house, and causes great annoyance to him and his family.

5. That on the      day of      18      , plaintiff notified the defendant that such use of said trip-hammer was a nuisance for said reasons, and requested him to discontinue its use, but the defendant refused so to do.

• Wherefore plaintiff prays judgment that the said nuisance be abated.

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CHAPTER II.  
ADMINISTRATION.

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## Form No. 315.

## BY CREDITOR.

Plaintiff states :—

1. That E F, late of      , was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of Rs.      (here insert nature of debt, and security, if any).

2. That the said E F made his last will, dated the      day of      18      , and thereby appointed C D executor (or devised his estate in trust, &c., or died intestate, as the case may be).

3. That the said will was proved by the said C D (or, letters of administration were granted, &c.).

4. That the defendant has possessed himself of the moveable (and immoveable, or proceeds of the immoveable) property of the said E F, and has not paid the plaintiff his said debt of Rs.      .

5. That the said E F died on or about the      day of      18      .

Wherefore plaintiff prays that an account may be taken of the moveable (and immoveable) property of the said E F, deceased, and that the same may be administered under the decree of the Court.

**When Suit may be Brought.**—An administration suit is usually brought by a creditor of the deceased suing on behalf of all the creditors, for which purpose their consent is unnecessary, or by a creditor claiming payment of his debt, or by a legatee, or one of the next of kin, or by a devisee, or the heir; but a suit by one or more creditors on behalf of other creditors cannot be entertained without leave of the Court being obtained for its institution, which must be obtained before hearing.\*

Persons interested in the estate of a testator, not being the legal personal representative of the testator, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate.†

**Practice.**—In an administration by the Court of the property of a deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, as may be in force for the time being with respect to the estate of persons insolvent, and all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration, and make such claims against the same as they may respectively be entitled to by virtue of the Civil Procedure Code.‡

### Form No. 316.

#### BY SPECIFIC LEGATEE.

Plaintiff states :—

1. That E F, late of \_\_\_\_\_, duly made his last will, dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and thereof appointed C D executor, and by such will bequeathed to the plaintiff (here state the specific legacy).
2. That said will was proved by the said C D.
3. That the defendant is in possession of the moveable property of the said E F and, amongst other things, of the said (here name the subject of the specific bequest).
4. That E F died on or about the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_.

\* *Oriental Bank Corporation v. Gobind*, I. L. R., 9 Cal. 604.

† *Oriental Bank Corporation v. Gobin Lal Seal*, I. L. R., 10 Cal. 713.

‡ C. P. C., s. 213.



Wherefore plaintiff prays that the defendant may be ordered to deliver to him the said (here name the subject of the specific bequest), or that an account may be taken of the moveable (and immoveable) property of the said E F, deceased, and that the same may be administered under the decree of the Court.

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**Form No. 317.**

**BY PRUENIARY LEGATEE.**

Plaintiff states :—

1. That E F, late of \_\_\_\_\_, duly made his last will, dated the day of \_\_\_\_\_ 18 \_\_\_\_\_, and thereof appointed C D executor, and by such will bequeathed to the plaintiff a legacy of Rs. \_\_\_\_\_.

2. That the said will was proved by the said C D.

3. That defendant has possessed himself of the moveable (and immoveable) property of the said E F, and has not paid the plaintiff his said legacy of Rs. \_\_\_\_\_.

4. That said E F died on or about the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.  
(Prayer as in form No. 315.)

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**Form No. 318.**

**THE SAME—ANOTHER FORM.**

Plaintiff states :—

1. That A B, of K, in \_\_\_\_\_, duly made his last will, dated the day of \_\_\_\_\_ 18 \_\_\_\_\_, whereby he appointed the defendant and M N (who died in the testator's lifetime) executors thereof, and bequeathed his property, whether moveable or immoveable, to his executors, in trust, to pay the rents and income thereof to the plaintiff for his life and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the person who would be the next-of-kin, if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. That the testator died on the      day of      18      , and his will was proved by the defendant on the      day of      18      .

3. That the plaintiff has not been married.

4. That the testator was at his death entitled to moveable and immoveable property ; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property ; and he has sold part of the immoveable property.

Plaintiff claims :—

1 To have the moveable and immoveable property of A B administered in this Court, and for that purpose to have all proper directions given and accounts taken ;

2 Such further or other relief as the nature of the case may require.

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## CHAPTER III.

### DIVORCE.

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#### Form No. 319.

BY HUSBAND FOR A DISSOLUTION ON THE GROUND OF ADULTERY.

Plaintiff states :—

1. That he was, on the      day of      18      , at      , lawfully married to C B, then C D, spinster.

2. That from his said marriage, plaintiff lived and cohabited with his said wife at      , and at      , and lastly at      , in      , and he and his said wife have had issue of their said marriage five children, of whom two sons only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the      day of      18      , X Y was constantly, with few exceptions, residing in plaintiff's house at      aforesaid, and on divers occasions, during the said period, the dates of which are unknown to plaintiff, the said C B, in plaintiff's said house, committed adultery with the said X Y.

4. That no collusion or connivance exists between plaintiff and his said wife for the purpose of obtaining a dissolution of their said marriage, or for any other purpose.

Wherefore plaintiff prays that this Honorable Court will decree a dissolution of the said marriage, and that the said X Y do pay the sum of Rs. 5,000 as damages by reason of his having committed adultery with plaintiff's said wife, such damages to be paid to plaintiff, or otherwise paid or applied as to this Honorable Court seems fit.

**Form of Application for Relief.**—There is nothing in the Divorce Act which expressly requires that relief shall be applied for by petition (except in the case of applications for judicial separation), and section 45 provides that all proceedings under the Act shall be regulated by the Code of Civil Procedure; consequently there is no reason why application for relief should not be made in the ordinary form of plaints.

**Jurisdiction.**—The Court has jurisdiction in all cases where the petitioner is a Christian; it would, therefore, be no answer that petitioner is a Roman Catholic, although by the Canon law marriage is indissoluble, but it would be a good plea that petitioner is an atheist or infidel. It is no objection that the law of the country of domicile of the parties, or where the marriage took place, does not grant divorce.

**Necessary Averments.**—The plaint should state that there is no collusion between the parties;\* but this does not mean a mutual desire that the petition may succeed; there must be an understanding between the parties as to the conduct of the proceedings, such as suppressing evidence on one side.

The plaint should specify the amount claimed as damages.†

**Alimony Pending the Suit.**—The wife may in all cases apply for alimony pending the suit.‡ Such alimony must not exceed one-fifth of the husband's average income for the three preceding years. It may be ordered to commence from the date of the service of the citations, and to run until the final decree.§

In an application for alimony, it is sufficient to set out the fact of the marriage in the petition; an affidavit to that effect is unnecessary.||

**Bar to Suit—Conduct Conducing to the Adultery.**—When a husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt, and he did not write to her, or

\* Divorce Act, 1869, s. 12.

† Spedding v. Spedding and Smith, 31 L. J. P. & M. 96.

‡ Divorce Act, 1869, s. 36.

§ Kelly v. Kelly, 3 B. L. R. App. 4.

|| Crump v. Crump, 3 B. L. R., O. C., 101.

make her an allowance proportionate to his income after he had done so, it was held upon the husband's petition for dissolution on the ground of the wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought.\*

**Witnesses.**—No witness in any proceeding, whether a party to the suit or not, shall be liable to be asked, or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery, or unless, in the case of a party to the suit, he or she offer himself or herself as a witness.† A co-respondent subpoenaed by the plaintiff does not "offer" to give evidence under section 51 of the Divorce Act, although he do not object to be sworn.‡

**Delay.**—The presumption of connivance or indifference arising from delay in bringing suit for dissolution on the ground of the wife's adultery may always be removed by an explanation of the circumstances.§

**Application to make Decree Absolute—Arrears of Alimony.**—A husband who had obtained a decree *nisi* for the dissolution of his marriage with his wife on the ground of her adultery applied to have such decree made absolute. At the time this application was made arrears of alimony *pendente lite* were due to the wife. The Court refused to make such decree absolute until such arrears were paid.||

**Service of Decree on Respondent.**—It is not necessary in order that a decree *nisi* for dissolution of marriage may be made absolute that the decree should be served upon the respondent.¶

**Parties—Co-respondents.**—The alleged adulterer must be made a co-respondent, unless plaintiff is excused from doing so on any of the grounds named in section 11 of the Divorce Act.

**Intervenor—Practice.**—Under the Indian Divorce Act, 1869, a third person may show cause against a decree *nisi* being made absolute, but is not at liberty to institute proceedings, *e.g.*, by obtaining a rule *nisi* to show cause why a new trial should not be had, and proceedings stayed. A new trial cannot be granted, there being no provision in the Civil Procedure Code for the granting of a new trial. A person acting at the instance of the respondent is not entitled to intervene, or show cause against the decree being made absolute, because a respondent has no right to show cause, and he cannot do indirectly through another what he is not permitted to do himself.\*\*

\* *Holloway v. Holloway*, 1. L. R., 5 All. 71.

† See ss. 7 and 51, Divorce Act, 1869, and 32 and 33 Vic., c. 68.

‡ *DeBretton v. DeBretton*, 1. L. R., 4 All. 49.

§ *Williams v. Williams*, 1. L. R., 3 Cal. 688.

|| *DeBretton v. DeBretton*, *supra*.

¶ *Hicks v. Hicks*, 1. L. R., 8 Cal. 756.

\*\* *King v. King*, 1. L. R., 6 Bom. 416.

## Form No. 320.

## BY WIFE FOR JUDICIAL SEPARATION ON THE GROUND OF ADULTERY.

Plaintiff states:—

1. That on the       day of       18    , plaintiff, then C D, was lawfully married to the defendant A B at the Church of       in       .
2. That after her said marriage plaintiff cohabited with the defendant at       and at       , and plaintiff and her said husband have issue living of their said marriage, three children (state their respective ages).
3. That on divers occasions, in or about the months of       and       18    , the defendant, at       aforesaid, committed adultery with E F, who was then living in the service of the defendant and plaintiff at their said residence at       aforesaid.
4. That on divers days and times between the       day of       18    , and the commencement of this suit, defendant has committed adultery with G H, and is now living and cohabiting with the said G H at       .
5. That no collusion or connivance exists between your petitioner and the said defendant with respect to the subject of the present suit.
6. That defendant is the owner and possessed of the following described property (describe it, and state its value).
7. That the rents and profits of the said property are of the monthly value of Rs.       .
8. That defendant carries on the business of       at       , and from such business derives the nett annual income of from Rs.       to       .

Wherefore plaintiff prays:—

1. That this Honorable Court will decree a judicial separation to plaintiff from her said husband by reason of his aforesaid adultery, and that the custody of said minor children be awarded to the plaintiff.
2. That the defendant be ordered to pay to the plaintiff such permanent alimony for the maintenance of herself and the said children as may be just, and that such portion of the property herein described as may be sufficient to secure the said permanent alimony be settled on the plaintiff and her said children, and that pending the determination of this suit the defendant be enjoined and restrained from disposing of, or in any manner incumbering, the said property.

3. That the defendant pay to plaintiff such sum for alimony pending this suit as to this Honorable Court may seem just.
4. For the costs of suit.
5. For such other relief as may be just and proper.

**Custody of Children.**—Under section 41 of the Divorce Act, the Court may make any order it deems proper for the custody, maintenance, and education of the minor children. When a wife obtains a decree, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children.\*

**Permanent Alimony—Security.**—The Court may order the husband to give security for the payment of alimony ;† but the Court should be very reluctant, even supposing they have the power, to tie up the property of the husband, and so convert alimony into an absolute interest and charge upon his estate.‡ As to the principle on which the Court will grant permanent alimony, see cases noted below.§

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### Form No. 32I.

#### BY WIFE FOR JUDICIAL SEPARATION ON THE GROUND OF CRUELTY.

Plaintiff states :—

1. (Allege marriage.)

2. That from her said marriage, plaintiff lived and cohabited with her said husband at                      until the              day of              18    , when she separated from her said husband as hereinafter more particularly mentioned, and that she and he, the said husband, have had no issue of their said marriage.

3. That from and shortly after plaintiff's said marriage, the said C B habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of              18    , the said C B in the highway, and opposite to the house in which plaintiff and the said C B were then residing at              aforesaid, endeavoured

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\* *Macleod v. Macleod*, 6 B. L. R. 218.

† Divorce Act, 1869, s. 37.

‡ *Fowle v. Fowle*, 1 L. R., 4 Cal. 260, following *Hyde v. Hyde*, 4 S. & T. 80.

§ *Ord v. Ord*, 5 B. L. R. App. 34; *Smyth v. Smyth*, 5 B. L. R. App. 153.

to knock plaintiff down, and was only prevented from so doing by the intervention of F D, plaintiff's brother.

(State the particulars of other acts of cruelty, specifying date and place for each, and the nature of the act.)

5. That on the afternoon of the      day of      18      , plaintiff, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at      , and that from and after the said      day of      18      , plaintiff has lived separate and apart from her said husband, and has never returned to his house, or to cohabitation with him.

6. That there is no collusion or connivance between plaintiff and her said husband with respect to the subject of the present suit.

Wherefore plaintiff prays for decree for a judicial separation between her and the said C B and for the costs of suit.

**Cruelty Defined.**—Cruelty means actual violence of such a character as to endanger personal health or safety, or a reasonable apprehension of it.\* Words of menace, if they raise a reasonable apprehension, will warrant the interference of the Court;† and it matters not whether the menace be addressed to the wife or to a third person.‡ Spitting in the wife's face is gross cruelty;§ and so also the wilful communication of venereal disease;|| but habitual drunkenness does not amount to legal cruelty,¶ even when accompanied by violence.\*\* A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and without reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation.††

**Necessary Averments.**—The cruelty must be specifically pleaded, and if it is not, the Court will not allow the issue to be raised, or evidence given.††

\* *Milford v. Milford*, 36 L. J., P. & M., 30; 1 L. R., P. & D., 296; and see the leading case *Evans v. Evans*, 1 Hogg. Cons. 35.

† *Harris v. Harris*, 2 Hogg. Cons. 143; *Kirkman v. Kirkman*, 1 Hogg. Cons. 409.

‡ *D'Aguilar v. D'Aguilar*, 1 Hogg. Eco. 776.

§ *D'Aguilar v. D'Aguilar*, *supra*; *Curtis v. Curtis*, 1 Sw. & Tr. 187; *Saunders v. Saunders*, 1 Roberts 549.

|| *Brown v. Brown*, 1 L. R., P. & D., 46; 35 L. J., P. & M., 13.

¶ *Hudson v. Hudson*, 3 Sw. & Tr. 314.

\*\* *Scott v. Scott*, 29 L. J., P. & M., 64.

†† *Augustin v. Augustin*, 1 L. R., 4 All. 374.

†† *Kelly v. Kelly*, 3 B. L. R. App. 6.

## Form. No. 322

## ALLEGATION OF DESERTION.

That in or about the year        the defendant wilfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues to wilfully and without cause desert and abandon the said plaintiff, and to live separate and apart from her, without any sufficient cause or any reason, and against her will, and without her consent.

**Desertion Defined.**—The desertion must be against the wish of the party charging it ;\* merely leaving the wife to live with another woman is not sufficient to constitute desertion ;† and the expression “against the wish” means contrary to an actively expressed wish,‡ and although the word abandonment is undefined the effect of clause 9 of section 3 of Act IV. of 1869 is to introduce into the Act the view adopted by the Courts in England in construing the English Act.§

**Resumption of Co-habitation when Unnecessary.**—Although where the separation is the act of the wife, or where she of her own free-will assents to a complete separation, there can be no desertion ; nor, until the husband and wife have again cohabited, can subsequent conduct transform what was a voluntary separation into desertion by the husband ; yet where the separation was not brought about by the wife, nor in accordance with her wishes, but by the misconduct of the husband, desertion may take place without a resumption of cohabitation.||

## Form No. 323.

## BY WIFE FOR DECREE OF NULLITY ON THE GROUND OF IMPOTENCY.

Plaintiff states :—

1. That on the        day of        18        , plaintiff, then a spinster, eighteen years of age, was married in fact, though not in law, to C D, then a bachelor of about thirty years of age, at (some place in India).

2. That from the said        day of        18        , until the month of        18        , plaintiff lived and cohabited with the said C D at divers places, and particularly at        aforesaid.

3. That the said C D has never consummated the said pretended marriage by carnal copulation.

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\* Divorce Act, 1869, s. 2.

† Ward v. Ward, 27 L. J., P. & M., 63 ; Thompson v. Thompson, 27 L. J., P. & M., 66.

‡ Fowle v. Fowle, 1 L. R., 4 Cal. 260.

§ Fowle v. Fowle, *supra*.

|| Wood v. Wood, 1 L. R., 3 Cal. 485 ; 1 C. L. R. 485.



4. That at the time of the celebration of plaintiff's said pretended marriage, the said C D was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said C D with respect to the subject of this suit.

Wherefore plaintiff prays that this Honorable Court will declare that the said marriage is null and void.

**Bar to Suit for Nullity.**—Lapse of time coupled with an indirect motive for bringing the suit is an absolute bar;\* mere lapse of time is not an absolute bar but renders necessary the clearest, strictest, and most unequivocal evidence of the facts relied on.†

**Impotence.**—The impotency must have existed before the marriage, and must be permanent.‡

**Presumption of Impotence.**—If the plaintiff is *virgo intacta*, the Court may conclude the respondent to be impotent.§

**Cohabitation.**—No suit for nullity on the ground of impotency will be entertained unless the parties have cohabited for three years.||

**Practice.**—If the impotency is denied, an order should be issued to respondent requiring him or her to submit to a personal examination,¶ and it is of no consequence that he does not submit.\*\*

**Prohibited Degrees.**—A marriage between persons which would be void in their country of domicile on the ground of consanguinity or affinity is void, though celebrated in a country where it is good by law.††

In the recent case of *Lopez v. Lopez* it was held :

1. That the British laws of prohibited degrees are not applicable to all Christians in India; they bind only (European) British subjects and their descendants.

\* *H. (falsely called C.) v. C.*, 2 Sw. & Tr. 605; 21 L. J., P. & M., 100; *Hall v. Castledon*, 9 H. L. C. 183; *E. v. T. (falsely called E.)*, 3 Sw. & Tr. 312.

† *Castledon v. Castledon*, 9 H. L. C. 190.

‡ *Stagg v. Edgecombe*, 32 L. J., P. & M., 153.

§ *N. v. M.*, 2 Roberts.

|| *Sparrow v. Harrison*, 3 Curt. 16.

¶ *H. (falsely called C.) v. C.*, 29 L. J., P. & M., 81; *S. (falsely called E.) v. E.*, 31 L. J., P. & M., 164; 3 Sw. & Tr. 240.

\*\* *Pollard v. Wybourn*, 1 Hogg. 727.

†† *Brook v. Brook*, 7 Jur., N. S., 313.

2. When the parties are not European British subjects, or the descendants of such, they are regulated by the customary law of the class to which they belong; and, therefore, where the parties are Roman Catholics, the laws of that Church apply to them.
3. The words "prohibited degrees" in section 19 of the Divorce Act, 1869, mean the degrees prohibited by the law applicable to the parties to the marriage.

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**Form No. 324.**

**ALLEGATION THAT FORMER HUSBAND OR WIFE LIVING.**

That at the time of the said marriage the said defendant had a former wife (or husband) living, and that the defendant's marriage with said former wife (or husband) was then, to wit, at the time of plaintiff's said marriage to the defendant, in force, and undissolved by decree of divorce or otherwise.

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**Form No. 325.**

**ALLEGATION OF LUNACY.**

That at the time of such marriage he (or she) was a lunatic, and incapable of contracting a marriage, and has been (state the duration).

That the defendant is now perfectly recovered of his (or her) lunacy aforesaid, and restored to his (or her) right mind, memory, and understanding, and has been for about      months last past, and that since his (or her) restoration to a sound state of mind as aforesaid, the plaintiff has not cohabited with said defendant.

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**Form No. 326.**

**BY WIFE FOR RESTITUTION OF CONJUGAL RIGHTS.**

Plaintiff states:—

1 & 2. (Allege marriage, residence; and cohabitation.)

3. That since the      day of      18      , the defendant, without any lawful cause, hath withdrawn himself, and still does withdraw himself, from bed, board, and mutual cohabitation with plaintiff, and has refused, and still does refuse, to render to her conjugal rights, although requested by her so to do.

Wherefore plaintiff prays for decree for restitution of conjugal rights to plaintiff from defendant, and for the costs of suit, and for such other and further relief as to this Honorable Court may seem meet.

**Child-wife.**—The Court will refuse to pass a decree for the restitution of a child-wife to her husband unless he can prove that she has attained puberty.\*

**Decree—What to Contain.**—According to the English practice, the decree should contain an order that, if the decree be not obeyed within a specified time, attachment will issue; † but the form given in the schedule to the Indian Divorce Act merely requires the respondent to comply with the order of the Court within a month, and to certify that he has done so.

**Decree—How Enforced.**—The decree for restitution of conjugal rights may be enforced by the imprisonment of the defendant, or by attachment of his property; ‡ and when an attachment has remained in force for one year, and the judgment-debtor has not obeyed the decree, the property may be sold, and out of the proceeds the Court may award the decree-holder such compensation as it thinks fit.§

**Limitation.**—In suits for restitution of conjugal rights, two years from the time when restitution is demanded and refused by the husband or wife, being of full age and sound mind.||

## CHAPTER IV.

### FORECLOSURE AND REDEMPTION OF MORTGAGES.

#### Form No. 327.

#### FOR FORECLOSURE OR SALE.

Plaintiff states:—

1. That by a mortgage-deed, dated the      day of      18      , a house with the garden and appurtenances (describe the same), situated within the jurisdiction of this Court, were conveyed by the defendant to the plaintiff, his heirs (or executors, administrators), and assigns, to secure the principal sum of Rs.      , together with interest thereon at the rate of Rs.      per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. That there is now due from the defendant to the plaintiff the sum of Rs.      for principal and interest on the said mortgage.

\* *Suntoosh Ram Doss v. Gera Pattuck*, 23 W. R. 22.

† *Cherry v. Cherry*, 29 L. J., P. & M., 141.

‡ C. P. C., s. 260.

§ C. P. C., ib.

|| Art. 35, Limitation Act, 1877.

Plaintiff prays :—

- (a) That the Court will order the defendant to pay him the said sum of Rs. , with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and, in default, that the right to redeem the said mortgaged premises may be foreclosed, and the plaintiff placed in possession of the same premises ; or,
- (b) That the said premises may be sold, and the proceeds applied in and towards the payment of the amount of the said principal, interest, and costs, and that, if such proceeds shall not be sufficient for the payment in full of such amount, the defendant do pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization, and that, for that purpose, all proper directions may be given and accounts taken by the Court.

**Mortgages—How Effected.**—In those provinces where the Transfer of Property Act, 1882, is in force, a mortgage, when the principal money secured is one hundred rupees or upwards, can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses ; when the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed by the mortgagor, and attested by two witnesses, or (except in the case of a simple mortgage) by delivery of the property.\*

**Mortgagor's Remedies.**—The fact that a money-decree has been obtained on a bond by which property has been mortgaged does not destroy the lien on that property, and therefore it is open to a plaintiff to establish his right on the bond as well as on the decree.† But when the mortgagee proceeds to satisfy such decree by the sale of his security, the interests of both himself and his judgment-debtor in the said security pass to the auction-purchaser,‡ unless the auction-purchaser had notice of the mortgage.§

**Demand.**—The mere fact that the period limited in a mortgage by a deed of conditional sale has expired without its being satisfied does not absolve the mortgagee from the obligation of making a demand for payment of the mortgage-debt before the institution of foreclosure-proceedings.¶

\* S. 59.

† *Hasoon Arra Begum v. Jawadoonissa Satooda Khandan*, I. L. R., 4 Cal. 29; *Syud Emam Montasooddeen Mahomed v. Rajoomar Dass*, 14 B. L. R., F. B., 408.

‡ *Narsidas Jitram v. G. Joglekar*, I. L. R., 4 Bom. 57, and cases there cited.

§ *Rajkishore Shaha v. Bhadoo Noahoo*, I. L. R., 7 Cal. 78.

¶ *Behari Lal v. Beni Lal*, I. L. R., 3 All. 408.

**Parties.**—It is advisable for a mortgagee, though it is not incumbent on him, to make all subsequent incumbrancers parties ;\* it is not incumbent on him to search for subsequent incumbrancers in order to make them parties to the suit. In the absence of notice, he would properly proceed against the person *prima facie* liable to him ; and the mere registration of a subsequent sale or mortgage would not amount to notice.† He should, however, make the persons in possession parties.‡ By section 85 of the Transfer of Property Act all persons having an interest in the property must be made parties in all suits relating thereto, provided that the plaintiff has notice of such interest.

**Accounts.**—The necessity on the part of the mortgagee to account only arises, *firstly*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of accounts ; *secondly*, when he has deposited all that he admits or alleges to be due ; and, *thirdly*, when he pleads and undertakes to prove that the whole of the principal and interest have been liquidated by the usufruct of the property.§ By the Transfer of Property Act, section 76, a mortgagee in possession must keep accurate accounts, and give the mortgagor copies on demand.

In taking an account, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest.||

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on from the date of the loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realized over and above the interest to which the mortgagee is entitled from the date of realization ; or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal. The result attained by these methods is the same.

In a suit by a second mortgagee against his mortgagor and a third mortgagee, asking for an account and sale, the Court directed an account to be taken not only of what was due to the plaintiff, but also of what was due to the third mortgagee.¶

**Interest.**—Upon an adjustment of accounts between the lender and borrower upon any mortgage or conditional sale of landed property, or other contract whatsoever, interest shall be calculated at the rate stipulated therein, or, if no rate has been agreed upon, at such rate as the Court shall deem reasonable.\*\*

\* *Khub Chand v. Kallan Das*, per Turner, J., I. L. R., 1 All. 240 at p. 245.

† *S. B. Shringarpure v. S. B. Pethe*, I. L. R., 2 Bom. 662.

‡ *Ram Yad Singh v. Lalla Saligram Singh*, 16 W. R. 98.

§ *Forbes v. Ameroonissa*, 10 Moore's Ind. Ap. 340 ; 5 W. R. 47.

|| *Ganga Mulik v. Bayaji*, I. L. R., 6 Bom. 669.

¶ *Auhindro Bhosun Chatterjee v. Channoollel Johurry*, I. L. R., 5 Cal. 101.

\*\* Act XXVIII. of 1855, s. 6.

When a day is specified in the mortgage-bond for the payment of the principal and interest at a stipulated rate, the Court may, in its discretion, award interest, from the due date, at such rate as it thinks fit, and is not bound to award interest at the stipulated rate.\*

In suits to recover the principal and interest of a loan secured by a mortgage of immoveable property, interest for twelve years is recoverable by virtue of article 132 of Schedule II of the Limitation Act, 1877.

**Marshalling.**—The doctrine of marshalling does not apply as between a mortgagee and attaching creditors who hold mere money-decrees.†

**Appointment of Receivers.**—The Court may, under section 44 of the Specific Relief Act and 503 of the Civil Procedure Code, appoint a receiver, when it appears necessary for the realization, preservation, or better custody or management of any property, moveable or immoveable.

A receiver will not be appointed as against a first mortgagee rightly in possession unless he has been paid off or refuses to accept what is due to him; or cannot satisfactorily show that anything or what is still due to him.‡

**Power of Sale in Mortgage.**—In those provinces where the Transfer of Property Act, 1882, is in force, the validity of a power of sale in a mortgage is determined by section 69 of that Act; before that Act, it had been held that a sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussil of Bombay, under a power of sale contained in an indenture of mortgage in the ordinary English form, was valid, if due notice were given to the mortgagor of the mortgagee's intention to sell, and the sale were fairly conducted.§ And the mortgagee could not be restrained from exercising such power of sale because the mortgagor had filed a suit for redemption, and injunction would only issue if the mortgagor paid the amount due into Court, or gave *prima facie* evidence of fraud or unfairness in the sale.||

**Equitable Mortgages.**—Purchasers, however remote, though with notice of a prior equitable mortgage, from a *bond fide* purchaser for value without notice, hold the property free from the equitable mortgage.¶

**Test for Registration.**—In determining the question whether a document should be registered, it is the value of the interest created, and not the consideration paid, which must be regarded. When the consideration named in a mortgage-bond is below Rs. 100, but the least sum payable for principal and interest is over

\* Deen Doyal Lall v. Het Narain Singh, I. L. R., 2 Cal. 41.

† Kristodass Kundoo v. Ram Kant Roy Chowdhry, I. L. R., 6 Cal. 142.

‡ Berney v. Sewell, 1 J. and W. 647; Oodrington v. Parker, 16 Ves. 469; Hills v. Moore, 15 Beav. 175.

§ Pitamber Narayendas v. Vanmali Shamji, I. L. R., 2 Bom. 1.

|| Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar, I. L. R., 2 Bom. 252.

¶ Dayal Jairaj v. Jivraj Batauni, I. L. R., 1 Bom. 237.

Rs. 100, the registration is compulsory ;\* where, therefore, the principal secured is below Rs. 100, and the obligor, though not bound to pay the principal and interest before a certain date, is not prevented from paying the principal debt immediately, registration is not compulsory.†

**Effect of Registration.**—Registered instruments take effect against any oral agreement or declaration relating to the property except when accompanied or followed by delivery of possession ; and registered instruments take effect against unregistered documents relating to the same property, whether the document be of the same nature or not.‡

The reason for the exception made by the Registration Act in favour of an oral agreement accompanied by possession is, that by such possession the parties who rely upon a subsequent registered deed, had, or might, if they had been reasonably vigilant, have had, previously to their entering into their contract with the vendor and to their taking a conveyance, notice, by the fact of such possession, that there was some prior claim to the property. Therefore, when they had actual notice of a prior oral agreement, although unaccompanied by possession, the object of the Legislature is fully attained.§

Ordinarily, registration amounts to notice, and is an equivalent for possession ; but this rule cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it,|| because it could not have operated as notice to the subsequent purchaser (or mortgagee).¶

A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice ;\*\* nor even against a prior *agreement for sale* of which he had notice.††

An instrument, the registration of which under the Registration Act, 1871, was compulsory, if duly registered, takes effect against an instrument of prior date, the registration of which, under the Act of 1871, was optional, and which is not registered ;‡‡ and a document registered under the Act of 1877 takes effect as against a document, the registration of which, under the Act of 1871, was optional, and which was not registered thereunder.§§

\* Kattamuri Jagappa v. Padalu Latchappa, I. L. R., 5 Mad. 119 ; but see Habib-ullah v. Nakohed Rai, I. L. R., 5 All. 447, overruling Hummat Singh v. Sewa Ram, I. L. R., 3 All. 157.

† Sadagopayyengar v. Dorasami Sastri, I. L. R., 5 Mad. 214 ; Ahmad Bakhsh v. Gobindi, I. L. R., 2 All. 216.

‡ Registration Act, 1877, ss. 48 and 50.

§ Waman Ramchandra v. Dhondiba Krishnaji, I. L. R., 4 Bom. 127.

|| Lakshmandas Sarupchand v. Dasrat, I. L. R., 6 Bom. 163.

¶ Hasha v. Ragho Ambo Gondhali, I. L. R., 6 Bom. 165.

\*\* Shivram v. Genu, I. L. R., 6 Bom. 515.

†† Chunder Nath Roy v. Bhoyrab Chunder Sarma Roy, I. L. R., 10 Cal. 251 ; Solano v. Lala Ram Lal, 7 O. L. R. 481.

‡‡ Dori Lal v. Umed Singh, I. L. R., 6 All. 165 ; Habib-ullah v. Nakohed Rai, I. L. R., 5 All. 447 ; but see Sri Ram v. Bhagirath Lal, I. L. R., 4 All. 237.

§§ Abdul Rahim v. Ziban Bibi, I. L. R., 5 All. 593.

**Effect of Fraudulent Registration.**—Registration cannot confer validity upon an instrument which is *ultra vires*, or illegal, or fraudulent. Persons claiming under a registered document which has been given, accepted, and registered, in fraud of a third party, and in collusion with the grantor, are not entitled to the benefit of section 48 of the Registration Act; and, therefore, the registration of a document of title, which has been procured in fraud of a party possessing a prior equitable title, and with actual notice of his prior equitable title, does not deprive such party of his priority.\*

**Registration of Receipts.**—Receipts passed by a mortgagee for sums paid on account of the mortgage-debt are not inadmissible in evidence for want of registration under Act III. of 1877, section 17, for the purpose of establishing the satisfaction of the mortgage-debt.†

**Registration of Agreement to Mortgage.**—An agreement to mortgage is admissible in evidence without registration; but for the purpose of proving an equitable title it must be registered before it is available in evidence.‡

**Registration of Assignments.**—Registration of an assignment of a decree for the sale of mortgaged property is an instrument the registration of which is compulsory.§ A deed of assignment for a consideration less than Rs. 100 of a mortgage for a consideration of Rs. 100 or upwards does not need registration.||

**Evidence of Sale or Mortgage.**—Although verbal evidence is ordinarily inadmissible to contradict a written contract, yet when a document appearing on its face to be an absolute sale is alleged to have been intended by the parties as a mortgage, parol evidence of the intention is admissible.¶

**Acquisitions.**—Under the English law, which, so far as it rests on principles of equity and good conscience, may properly be applied in India, it is recognized as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee, and conversely that many acquisitions by a mortgagee are in like manner to be treated as accretions to the mortgaged premises or substitutions for it, and therefore subject to redemption.\*\*

**Bottomry Bonds.**—No suit can be brought in the ordinary Civil Courts on a bottomry bond; such suits should be brought in the Admiralty Courts.††

\* *Waman Ramchundra v. Dhondiba Krishnaji*, I. L. R., 4 Bom. 127.

† *Sheikh Gungunfur Ali v. Mahomed Yaseen*, 20 W. R. 334; *Faki v. Khotu*, I. L. R., 4 Bom. 590; *Venkayayyar Venkalarama v. Chimalambi*, 7 Mad. H. C. R. 4; but see *contra* *Dulip Singh v. Durga Prasad*, I. L. R., 1 All. 443.

‡ *Bengal Banking Corporation v. MacKertich*, I. L. R., 10 Cal. 315.

§ *Gopal Narayin v. Trimbak Sadashiv*, I. L. R., 1 Bom. 267.

|| *Satra Kumaji v. Visram Haagavda*, I. L. R., 2 Bom. 97.

¶ *Kasheonath Chatterjee v. Chundy Churn Banerjee*, 5 W. R., O. R., 68; *Bakur Lakshman v. Govinda Kanji*, I. L. R., 4 Bom. 594.

\*\* *Raja Kisbendatt Ram v. Raja Mumtaz Ali Khan*, I. L. R., 5 Cal. 198; and see section 68, Transfer of Property Act, 1882.

†† *Gladston v. Harrison*, 24 W. R. 50.



**Limitation.**—In a suit by a mortgagee for foreclosure or sale, sixty years from the time when the money secured by the mortgage becomes due.\*

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**Form No. 328.**

**THE SAME—ANOTHER FORM.**

Plaintiff states :—

1. That on the       day of       18       , the defendant A B executed to the plaintiff a promissory note, conditioned to pay him Rs.       in       years with interest at       per cent. per annum, payable half-yearly.

2. That, for securing the payment of said note, the defendant A B executed to the plaintiff a mortgage of the same date upon (describe the property).

3. That the interest on the said sum mentioned in the said promissory note and in the said mortgage has been paid down to the day of       18       , but nothing more has been paid thereon; and the principal sum mentioned in said promissory note and mortgage, together with interest thereon from the       day of       18       , has not been paid by defendant.

4. That the plaintiff, on the       day of       18       , paid on said premises the sum of Rs.       for taxes duly levied thereon, which were a charge upon said premises legally attaching thereto; and the said sum of Rs.       taxes so paid by the plaintiff, and interest thereon at the rate of       per cent. per annum from the       day of       18       , has not been paid by the defendant to the plaintiff.

5. That the defendants (here insert the names of other claimants and incumbrancers) have, or claim to have, some interest or claim upon said premises, or some part thereof (as purchasers, mortgagees, judgment-creditors, or otherwise), which interests or claims are subsequent to and subject to the lien of the plaintiff's mortgage.

Wherefore plaintiff prays for judgment and decree,

1. That each of the defendants, and all persons claiming under any of them, subsequent to the execution of said mortgage, may be foreclosed of all equity of redemption or other interest in the said property;

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\* Art. 147, Limitation Act, 1877.

2. That the same may be sold, and the proceeds applied to the payment of the amount due on the said note and mortgage;
3. That if there be any deficiency, the defendant A B pay the same.

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**Form No. 329.**

**ALLEGATION OF INSURANCE BY PLAINTIFF.**

That the defendant did not keep the premises insured, but, on the contrary (suffered the insurance to expire on the      day of 18   ), in consequence whereof the plaintiff caused them to be insured in the      Company for the term of      from the      day of 18   , and paid therefor the premium of Rs.     .

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**Form No. 330.**

**FOR REDEMPTION.**

Plaintiff states:—

1. That on the      day of      18   , he executed to the defendant a mortgage upon certain property in the town of     , described as follows     , to secure the payment of Rs.      in      years, with interest at      per cent. per annum.
2. That on the      day of      18   , he tendered to the defendant Rs.     , being the principal of the said mortgage with interest from the date thereof to that time, and requested the defendant to acknowledge satisfaction for the same, but he refused to do so.

Wherefore plaintiff prays that he may redeem the said premises, and that the defendant may be ordered to re-convey the same to him upon payment of the said sum of Rs.     , and interest, upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such re-conveyance and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

**When Right to Redeem Commences.**—The general principle as to redemption and foreclosure is, that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem, and the right to foreclose, are co-extensive. A mortgage-deed stipulated that the mortgagor would pay the debt, with

interest, within ten years, and redeem the mortgaged property ; a suit instituted before the ten years had elapsed was held to be unsustainable, because prematurely instituted, the mere use of the word "within" not being a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years.\*

**Parties.**—A suit for redemption brought by the assignees of the equity of redemption cannot go on to a due determination until all the mortgagors are made parties.†

**Second Suit to Redeem.**—Where, in a suit for redemption of a mortgage, a decree was passed by consent to the effect that the land was redeemable upon payment of a certain sum on a certain date, but there was no direction in the decree that in default of payment the mortgage be foreclosed, and the decree was not executed, and, after three years, the right, title, and interest of the mortgagors in the land was purchased in execution of a decree by the plaintiff, who thereupon sued the mortgagee to redeem the land, it was held that the plaintiff was entitled to redeem.‡

**Court-fee.**—In a suit by the purchaser of the equity of redemption to redeem, the value of the subject matter of the suit, for the purposes of the Court Fees Act, is not the market-value of the land, but the amount of the mortgage-money.§

**Repairs.**—In a redemption-suit a mortgagee is entitled to credit for reasonable costs of repairs, if he renders an account of rents and profits.||

By section 76 of the Transfer of Property Act, 1882, a mortgagee is bound to keep the premises in repair out of the surplus rents, if there be such.

**Limitation.**—In a suit against a mortgagee to redeem, or to recover possession of immoveable property mortgaged, sixty years from the time when the right to redeem or to recover possession accrues.¶

\* *Vadju v. Vadju*, I. L. R., 5 Bom. 22.

† *Ram Baksh Singh v. Mohunt Ram Lall Does*, 21 W. R. 423.

‡ *Periandi v. Angappa*, I. L. R., 7 Mad. 423.

§ *Kubair Singh v. Atma Ram*, I. L. R., 5 All. 332.

|| *Lakshman Bhisaji v. Hari Dinkar Desai*, I. L. R., 4 Bom. 584.

¶ Art. 148, Limitation Act, 1877.

## CHAPTER V. INJUNCTION.

### Form No. 331.

#### FOR RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

Plaintiff states :—

1. That plaintiff is, and at all times hereinafter mentioned was, the owner of a portrait of his grandfather, which was executed by an eminent painter, and of which no duplicate exists (or state any facts showing that the property is of a kind that cannot be replaced by money).

2. That on the        day of        18        , at        , he deposited the same for safe keeping with the defendant.

3. That on the        day of        18        , he demanded the same from the defendant, and offered to pay all reasonable charges for the storage of the same.

4. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut, or injure the same if required to deliver it up.

5. That no pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the painting.

Wherefore plaintiff prays for decree :—

1. That the defendant be restrained by injunction from disposing of, injuring, or concealing the said painting.

2. That he return the same to the plaintiff.

**When Injunction will be Granted.**—The grant of temporary injunctions is regulated by sections 492 and 493 of the Civil Procedure Code, and all that need here be said respecting them is that they will not be granted except in cases where, unless the defendant be at once restrained by an injunction, irreparable injury or inconvenience may result to the plaintiff before the suit can be decided upon its merits.

The granting of perpetual injunctions is a matter for the wise discretion of the Court ; it is a remedy which should be guarded with extreme caution, and applied only in very clear cases.\*

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\* 2 Story's Eq. 959.

**Partnership.**—In partnership-suits one partner will be restrained from carrying on the concern for any other purpose than winding up; from damaging the value of the good-will, if it ought to be sold for the benefit of all; from improperly ejecting the representatives of his deceased co-partner; or from misapplying the assets to his own use and their detriment: and they, on the other hand, will be restrained from using property really belonging to the partnership, though standing in the name of the deceased partner.\*

**Trusts.**—In cases of trusts, it is the duty of a trustee, if a breach of trust is threatened, to prevent it by obtaining an injunction, and if a breach of trust has been already committed, to sue for the restoration of the trust fund, or take other active measures for that end; † where the trustee is about to do an act unauthorized by the true scope of the trust, the beneficiary may obtain an injunction to restrain the trustee therefrom. ‡

**Trespass.**—In cases of trespass, injunction will be granted where pecuniary compensation would not afford adequate relief, or when it is probable that pecuniary compensation cannot be got; § so, where the plaintiffs had purchased, and were in possession of, private family-vaults or graves, in perpetuity, in a private burial-ground annexed to a chapel, but which was closed from further use, and the trustees were proceeding to level the ground, and remove the tombstones, they were restrained from removing those belonging to the plaintiff. ¶ The Court will also interfere by issuing an injunction in a case of trespass in order to prevent a multiplicity of suits, ¶ as in the case where a man sets up an exclusive right, and the alleged trespassers are numerous; \*\* but in such a case, if the plaintiff asks for an injunction *pendente lite*, it will not be granted, unless it is clearly shown that the parties to be restrained will not suffer in the meantime, nor where plaintiff has shown a want of diligence in establishing his exclusive right. ††

**Light and Air.**—Any act by which the control of light and air are taken out of the hands of the person entitled to them, or by which the access of light and air to the window of a dwelling-house is interfered with, is *prima facie* an injury of a serious character, and no precedent warrants the substitution of damages for

\* *DeTastet v. Bordenare*, Jac. 516; *Turner v. Major*, 3 Giff. 442; *Elliot v. Brown*, 3 Swan 489n; *Hartz v. Shrader*, 8 Ves. 317; *Alder v. Fouracre*, Swan 3489n; *Lind*, on P. 1005.

† *In re Chertsey Market*, 6 Price 279; *Lewin on Trusts*, ch. xii.

‡ *Balls v. Strutt*, 1 Hare 146; *Lewin on Trusts*, ch. xxv.

§ See *cls. c* and *d*, s. 54, Specific Relief Act, 1877; *Hodgson v. Duce*, 2 Jur., N. S., 1014.

¶ *Morlard v. Richardson*, 2 Beav. 596.

¶ See *cl. c*, s. 54, Specific Relief Act.

\*\* See *illus. p*, s. 54, Specific Relief Act; *Lord Tenham v. Herbert*, 2 Atk. 483.

†† *Hanson v. Gardiner*, 7 Ves. 309.

an injunction in such a case against the plaintiff's will.\* The probability that the defendant will suffer greater loss by obeying the injunction, than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money-compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.†

**Sea-fishery.**—The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages, and restrain by injunction an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water mark and within three miles of it.‡

**Nuisance—Who are Liable for.**—See the notes under this head in the chapter on Nuisances. (Chap. VI., page 214, form 289.)

### Form No. 332.

#### FOR AN INJUNCTION RESTRAINING WASTE.

Plaintiff states:—

1. That he is the absolute owner of (describe the property).
2. That the defendant is in possession of the same under a lease from the plaintiff.
3. That the defendant has cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale, without the consent of the plaintiff.

Wherefore plaintiff prays for decree that the defendant be restrained by injunction from committing or permitting any further waste on the premises, and for the costs of suit.

**Mortgagors.**—A mortgagor becomes liable for commissive waste when the security becomes insufficient.§

**Mortgagees.**—A mortgagee in possession will be restrained by injunction from committing waste, if he does not apply the proceeds in sinking the interest and principal of his mortgage.||

**Tenants.**—A lessee is liable for commissive waste.¶

\* *Nand Kishor Belgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom. 95; *Jamnadas Shankarlal v. Vrijbhu Khan Shankarlal*, I. L. R., 2 Bom. 133.

† *Jamnadas Shankarlal v. Vrijbhu Khan Shankarlal*, *supra*.

‡ *Baban Mayacha v. Naga Shrivacha*, I. L. R., 2 Bom. 19.

§ See s. 66, Transfer of Property Act, 1882.

|| *Farrant v. Lovel*, 3 Atk. 723.

¶ See cl. o, s. 108, Transfer of Property Act, 1882.

**Joint Owners.**—An injunction will be granted to restrain a joint owner from committing equitable waste,\* but not legal waste.†

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**Form No. 333.**

**TO RESTRAIN THE USE OF PLAINTIFF'S TRADE-MARK.**

Plaintiff states :—

1. That before, and at the times hereinafter mentioned, at \_\_\_\_\_, the plaintiff manufactured and sold for profit large quantities of pen-knives, which he was accustomed to mark with a certain trade-mark, that is, with the words \_\_\_\_\_ impressed in a bracket upon the blades thereof (or with a device of \_\_\_\_\_, describe the trade-mark used by the plaintiff according to the fact), in order to denote that they were manufactured by him, and to distinguish them from articles of the same kind manufactured by other persons, and the plaintiff enjoyed great reputation with the public on account of the good quality of the said pen-knives, and made large profits by the sale of them..

2. That the defendant has, at various times since the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and still continues, wrongfully and fraudulently, and without the consent of the plaintiff, to manufacture at \_\_\_\_\_, large quantities of pen-knives, and caused them to be marked with the words \_\_\_\_\_ impressed in a bracket upon the blades thereof (or, with the device of \_\_\_\_\_, describe the mark used by the defendant), in imitation of the said trade-mark of the plaintiff, and in order to cause it to be believed that the last-mentioned pen-knives were manufactured by the plaintiff, and wrongfully and fraudulently sold, and continues to sell, the last-mentioned pen-knives as for pen-knives manufactured by the plaintiff.

3. That by reason of the premises the plaintiff was prevented from selling great quantities of the said pen-knives manufactured by him, and lost the profits, amounting to Rs. \_\_\_\_\_, which he would otherwise have gained by the sale thereof, and has been injured in his reputation in his said business by reason of the said pen-knives so manufactured and sold by the defendant being inferior in quality to those manufactured by the plaintiff.

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\* See ill. n, s. 54, Specific Relief Act, 1877.

† Job v. Patton, L. R., 20 Eq. 84.

**Trade-mark Defined.**—The Penal Code, section 478, defines a trade-mark as a mark used for denoting that goods have been made or manufactured by a particular person, or at a particular time or place, or that they are of a particular quality.

**When Suit Lies.**—In England it has been doubted whether there is or is not property in a trade-mark ; and the best opinion seems to be that there is no property in a trade-mark itself apart from, or except when applied to, goods of the kind to which it has been appropriated by its inventor ; thus, if another applied the same mark to a totally different kind of article, it would be no invasion of the right to use the mark.\* Section 54 of the Specific Relief Act enacts that for the purpose of that section a trade-mark is property ; but this would probably be interpreted in the sense indicated in the English rule given above.

The principle governing all cases in England is that the injury to the plaintiff arises only when the plaintiff has, by the appropriation of a particular trade mark, fixed in the market where his goods are sold, a conviction that the goods so marked were manufactured by him, and the defendant, by the use of similar marks, induces, or is likely to induce, the public to purchase his goods in the belief that they are those of the plaintiff.† The question is whether there is such a resemblance as was either intended, or is calculated, to deceive ordinary persons so as to induce them to purchase the defendant's goods under the supposition that they are the goods of the plaintiff ; and, if so, no special damage need be proved ;‡ if the resemblance is calculated to mislead incautious purchasers, that is enough, and an injunction should be granted, although no purchaser has actually been misled ; for the very life of a trade-mark depends upon the promptitude with which it is vindicated.§

Where plaintiff had adopted a certain trade-mark, and his goods had become favourably known under the name of "Talwar Shirtings," and the defendants adopted a mark not very closely resembling plaintiff's mark, but calculated to cause defendant's goods to bear in the market the same name as those of the plaintiff, a perpetual injunction was granted.||

**Evidence.**—Where a trader specially selects and appropriates to himself, for the purpose of distinguishing his goods, a particular device, that device becomes his trade-mark proper, and no one else is allowed to use it. But if, without any such special selection and appropriation, the goods of the trader do in fact happen to bear some particular mark, and this mark has come to be associated by the public with the trader's name, so that all goods bearing that mark are supposed to come from him,

\* *Collins and Co. v. Brown*, 3 K. and J. 423 ; see also *Leather Co. v. American Leather Co.*, 4 D. J. and S. 137 ; 10 Jur., N. S., 81 ; 11 Jur., N. S., 513 ; *Hall v. Barrows*, 4 D. J. and S. 150.

† *Singer M. Co. v. Loog*, 18 Ch. D. 395 ; see also the leading case on trade-marks *Croft v. Day*, in *Tudor's L. O. on Merc. and M. Law*.

‡ *Seixo v. Provesende*, L. R., 1 Ch. 92 ; *Cope v. Evans*, L. R., 18 Eq. 138 ; *Siebert v. Friedlander*, 7 Ch. D. 801 ; *Braham v. Beacham*, 7 Ch. D. 848.

§ *Johnson v. Orr Ewing*, 7 App. Cas. 219.

|| *T. A. Taylor v. Virasami Chetti*, I. L. R., 6 Mad. 108.



then also the law will not allow any person to use a mark of this latter description, any more than it will allow him to use a rival trader's trade-mark proper, because in either case there is made, or there is assumed to be made, a representation to the public which is false, *viz.*, that the goods which are the goods of one trader are the goods of another. But this distinction is drawn between the two cases. If it be shown that a trader has infringed a rival trader's trade-mark proper, *i. e.*, the mark which another trader has specially selected and appropriated for the purpose of distinguishing his goods, the Court will, without further evidence, at once interfere, taking it for granted that such a proceeding is calculated to deceive the public; whereas, if the mark be one which has not been specially selected and appropriated by the trader for this purpose, evidence must be given to show that the mark was so understood by the public as to make it clear that the proceeding had either deceived, or was at least calculated to deceive the public.\*

**Importers.**—There may be a right to an exclusive use of a trade-mark by traders who are importers only.†

**Copyright in Designs.**—Before Act XIII. of 1872 it had been held that the English Statutes‡ relating to copyright in designs not being expressly extended to India were not in force here; consequently the proprietor of a design registered under those Statutes could not sustain an action against a person who had applied such design, or who had sold any article to which such design had been applied in India; property in a design being a right totally distinct in its nature from that of property in a trade-mark, and could not be recognised or enforced in the Courts in India.§ By that Act, however, "any new and original pattern or design, or the application of any such pattern or design to any substance or article of manufacture," may be registered under Act XV. of 1859, and by section 4 the proprietor of the copyright of a design registered under the English Statutes is given in India the same remedies for any infringement thereof which he has in England.

\* *Halli v. Fleming*, I. L. R., 3 Cal. 417; 2 O. L. R. 93.

† *Halli v. Fleming*, *supra*,

‡ 5 and 6 Vic., c. 100; 6 and 7 Vic., c. 65; 13 and 14 Vic., c. 104; 21 and 22 Vic., c. 70; 24 and 25 Vic., c. 97.

§ *Baker, Takers, and Co. v. Sutherland, McGuffie, and Co.*, 16 W. R. 90.

## CHAPTER VI. INTERPLEADER.

### Form No. 334.

#### COMMON FORM.

Plaintiff states :—

1. That before the date of the claims hereinafter mentioned, one G H deposited with the plaintiff (describe the property) for safe keeping.
2. That the defendant C D claims the same under an alleged assignment thereof to him from the said G H.
3. That the defendant E F also claims the same under an order of the said G H transferring the same to him.
4. That the plaintiff is ignorant of the respective rights of the defendants.
5. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the Court shall direct.
6. That this suit is not brought by collusion with either of the defendants.

Wherefore plaintiff prays judgment :—

1. That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto ;
2. That they be required to interplead together concerning their claims to the said property ;
3. That some person be authorized to receive the said property pending such litigation ;
4. That upon delivering the same to such person the plaintiff be discharged from all liability to either of the defendants in relation thereto ;
5. For his costs of the suit.

**When Suit Lies.**—When two or more persons claim adversely to one another, the same payment or property, from another person, whose only interest therein is that of a mere stake-holder, and who is ready to render it to the right owner, such stake-holder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property

should be made or delivered, and of obtaining indemnity for himself.\* No suit will lie if the plaintiff claims an interest in the property,† or disputes the amount,‡ or if he is under a personal liability to either claimant,§ and the claims advanced must be *bond fide*.||

Plaintiff must be ready to deliver the property to the right owner, whether their titles have had a common origin, or are independent of each other.¶

**Necessary Averments.**—The plaint must state :—

1. That the plaintiff has no interest in the thing claimed otherwise than as a mere stake-holder ;
2. The claims made by the defendants severally ;
3. That there is no collusion between the plaintiff and any of the defendants.\*\*

**Payment into Court.**—When the thing claimed is capable of being paid into Court, or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.††

**Who may Sue.**—An agent or tenant cannot ordinarily dispute the title of his principal or landlord, and hence he is not allowed to institute an interpleader suit.‡‡ But if a landlord has created a subsequent intermediate tenure, or the agent is uncertain who his principal is, an interpleader suit will lie;§§ or if the principal has created an interest or lien on property, and the nature and extent of that interest or lien is in controversy, the agent might, for his own protection, have had interpleader;||| or if the persons claiming the same rent claim in privity of contract or tenure, as in case of a mortgagor and a mortgagee, or trustee and beneficiary.¶¶

\* C. P. C., s. 470.

† *Mitchell v. Hayne*, 2 S. and S. 63.

‡ *Heplock v. Hammond*, 2 Sm. and G. 141.

§ *Crawshaw v. Thornton*, 2 My. and Cr. 1, 19.

|| *In re, New Hamburg Brazilian Ry.*, W. N. 1875, p. 239.

¶ *Tanner v. European Bank*, 1 L. R., Ex., 261.

\*\* C. P. C., s. 471.

†† C. P. C., s. 472.

‡‡ *Dungey v. Augove*, 2 Ves. Jr. 310; *Cook v. Rosslyn*, 1 Giff. 167; *Dixon v. Hammond*, 2 B. and Ald. 313.

§§ *Clarke v. Byne*, 13 Ves. 383; *Stuart v. Welch*, 4 My. and C. 305.

||| *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215, 220.

¶¶ *Clarke v. Byne*, *supra*; *Johnson v. Atkinson*, 3 Anst. 798; *Hodges v. Smith*, 1 Cox. 357.

## CHAPTER VII.

## PARTITION.

## Form No. 335.

## FOR PARTITION OF IMMOVEABLE PROPERTY.

Plaintiff states:—

1. That he and the defendants C B and D B are the owners as tenants in common (or joint tenants) of the following described property (insert full description), and they are now in possession thereof.

2. That the plaintiff has an interest therein to the extent of one undivided third part thereof, and that each of the said defendants C B and D B have a similar interest therein (or other proportions, according to the fact).

3. That there are no liens or incumbrances thereon, and no person other than the plaintiff and said defendants are interested in said premises as owners or otherwise.

Wherefore plaintiff prays judgment:—

For a partition of the said property according to the respective rights of the parties aforesaid; or if a partition cannot be had without material injury to those rights, then for a sale of the said premises, and a division of the proceeds between the parties according to their interests.

## Form No. 336.

## ANOTHER FORM—ALLEGING WASTE.

Plaintiff states:—

1. That he is a tenant in common (or joint tenant) with the defendant, of (describe the property).

2. That each of them is entitled to an undivided half of the same.

3. That between the      day of      18      , and the      day of      18      , the defendant committed great waste upon the same (cutting down many valuable trees, or otherwise specify acts of waste), without consent of the plaintiff.

Wherefore plaintiff prays judgment :—

1. For Rs. , damages ;
2. For a partition of the said premises in such manner as to compensate him for such damages.

**Who may Sue for Partition.**—Every joint owner of property has a right to claim partition,\* and all the joint owners must be brought into Court.†

**Partition How Made.**—In suits for partition of property not paying revenue to Government, after ascertaining the respective interests of the parties, the Court should issue a commission to make the partition ;‡ and in the case of a decree for the partition of an estate paying revenue to Government, the decree must be carried into execution solely by the Collector.§

Raiyatwari holdings are not estates paying revenue to Government ;¶ and section 265 of the Civil Procedure Code applies only to permanently settled estates.¶

**Partition in Bengal.**—A suit for partition of revenue-paying land is not cognizable in the Civil Courts, though a suit to define plaintiff's share, and then to refer the partition to the Collector, is within jurisdiction ;\*\* and the Civil Courts have jurisdiction if the plaintiff does not seek to have his joint liability for the Government revenue annulled.††

**Partition in N.-W. P.**—In this province the jurisdiction of the Civil Courts in partition-suits is barred by Act XIX. of 1873 (s. 135), unless the correctness of the recorded shares, or of the right to share, is disputed ; in which case they can determine such rights, but the partition must be made by the Collector.

**Partition in Oudh.**—Under the Oudh Land-revenue Act, 1876, the Civil Courts have jurisdiction to declare the respective rights of joint owners,‡‡ but are, under section 95 of the Act, barred from making the partition.

**Partition in the Panjab.**—In the Panjáb the Civil Courts cannot take cognizance of suits for partition, unless the plaintiff disputes the correctness of the record-of-rights.§§

\* *Mitta Kunth Andhicarry v. Neerunjan Andhicarry*, 14 B. L. R. 166; *Srimati Padmamani Dasi v. Srimati Jagadamba Dasi*, 6 B. L. R. 134; *Shama Soonderoo Dabia v. Jardine Skinner*, 14 B. L. R. 167n.

† *Pahaladh Singh v. Mussamat Luchmunbutty*, 12 W. R. 256.

‡ C. P. C., s. 396.

§ O. P. C., s. 365; *Ramjoy Ghose v. Ram Banjun Chuckerbutty*, 8 C. L. R. 367.

¶ *Sakharam Krishnaji v. Madan Krishnaji*, 1 L. R., 5 Bom. 232.

\*\* *Muttuvayyengar v. Kudalalagayyengar*, 1 L. R., 6 Mad. 97.

†† *Ruttun Monee Dutt v. Brojo Mohun Dutt*, 22 W. R. 11; *Ayoodhia Lal v. Gumami*, 2 C. L. R. 184; *Chundernath Nundi v. Hur Narain Deb*, 1 L. R., 7 Cal. 153.

‡‡ *Chundernath Nundi v. Hur Narain*, *supra*.

§§ See s. 69.

§§ S. 65, Panjáb Land-revenue Act, 1871.

**Partition in Central Provinces.**—By clause 13 of section 152 of Act XVIII. of 1881, the Civil Courts in the Central Provinces cannot entertain a suit for partition, or for a declaration of right.

**Principle of Partition.**—Mere inconvenience to other joint owners is not a sufficient obstacle to a partition of joint property.\* If the property can be partitioned without destroying the intrinsic value of the whole property, or of the share, partition ought to be made; but where partition cannot be made without destroying the intrinsic value of the property, then a money-compensation should be given instead of the share which would fall to the plaintiff by partition.†

**Registration.**—A deed of partition of immoveable property between Hindus, if it does not create, at least declares an interest in immoveable property, and must therefore be registered;‡ but an instrument acknowledging that there had, in time past, been a partition between the brothers who signed it and the defendant, is not itself an instrument of partition, and does not require registration.§

**Limitation.**—In suits by a person excluded from joint family property to enforce a right to share therein, twelve years from the time when the exclusion becomes known to the plaintiff.||

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### Form No. 337.

#### FOR PARTITION—PART OWNER UNKNOWN—INCUMBRANCES.

Plaintiff states:—

1. That he has an interest to the extent of the one undivided fourth part in the following described premises (insert description), and he is now in possession thereof.

2. That the defendants C B and D B each own the one undivided fourth part of the said lands and premises, and are in possession of their said interests.

3. That one G H, who in his lifetime owned the one undivided fourth part of the said lands and premises, removed, several years ago, from this province to ; that he subsequently married, and had children, some of whom are now living, but their names and places of residence are wholly unknown to the plaintiff, and he cannot ascertain

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\* *Ram Pershad Narain Tewaree v. Court of Wards*, 21 W. R. 152.

† *Ashanullah v. Kali Kinkur Kur*, I. L. R., 10 Cal. 675.

‡ *Shankar Ramchandra v. Vishnu Anant*, I. L. R., 1 Bom. 67.

§ *Sakharam Krishnaji v. Madan Krishnaji*, I. L. R., 5 Bom. 232.

|| Art. 127, Limitation Act, 1877.

the same, although he has made diligent inquiry for that purpose; that G H and his wife are now dead; and that said children, and the heirs of any who may be dead, are collectively entitled to the undivided fourth which appertained to the said G H, and to which he would be entitled if now living.

4. That the defendant O P holds a mortgage upon the said interest of the said D B for Rs. , payable on the day of 18 , with interest at per centum per annum.

5. That no other incumbrances or liens upon said property exist, and no person other than those above named, and the unknown heirs of G H, are interested in said property.

Wherefore plaintiff prays:—

1. That the amount due on the said mortgage held by the said O P on the interest of D B be ascertained.
2. That a partition of the said property be made according to the rights of the respective parties, or, if a partition cannot be had without material injury to those rights, then that said premises be sold, and the proceeds applied as follows:—
  - (a.) To the payment of the general costs of this suit.
  - (b.) To the payment of the costs of reference.
  - (c.) That the residue be paid to the several owners in proportion to their respective interests, except that from the interest of the said D B there be first paid the amount due said O P under said mortgage; and that the interest belonging to the unknown heirs of the said G H be invested under the direction of the Court.

## CHAPTER VIII.

### PARTNERSHIP.

Form No. 338.

FOR DISSOLUTION.

Plaintiff states:—

1. That he and the defendant have been for the space of years last past carrying on business together at , within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively (or, under a verbal agreement between them).

2. That divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. That plaintiff desires to have said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles (or agreement).

Wherefore plaintiff prays the Court to decree the dissolution of the said partnership, and that the accounts of the said partnership-trading may be taken by the Court, and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant according to the terms of the said articles (or agreement), or that, if the said assets shall prove insufficient, he and the defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities, and costs, and to give such other relief as the Court may think fit.

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Form No. 339.

THE SAME—ANOTHER FORM.

Plaintiff states:—

1. That on or about the       day of,       18       , at       , the plaintiff and defendant, under certain articles of partnership in writing (or under a verbal agreement between them), entered into and formed a partnership for the purpose of (state nature of business), under the firm, name, and style of       , and that they thereafter entered upon and continued to transact such partnership-business under their firm name.

2. That since the commencement of the said partnership the defendant has wrongfully and without the assent of the plaintiff applied some of the money or receipts and profits of their said business to his



own use, and by reason thereof has become indebted to said partnership, and impeded and injured the business thereof.

3. That the plaintiff has repeatedly requested the defendant to pay into said partnership the money so received by him and misappropriated as aforesaid, or to account to said firm therefor, but that the defendant has heretofore neglected and refused, and still does neglect and refuse, so to account, and has threatened to continue to collect the partnership-debts, and appropriate the same to his own use.

Wherefore plaintiff prays :—

1. That said partnership may be dissolved, and an accounting taken of all dealings and transactions thereof.
2. That the property of the firm be sold, that its assets be realized, that each party may be ordered to pay into Court any balance due from him to the firm, that the debts and liabilities may be paid, that the costs of this suit may be paid out of the partnership-assets, and that the surplus (if any) be divided between the plaintiff and defendant according to their respective interests, or that, if the assets shall prove insufficient, plaintiff and defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities, and costs. And for such other relief as the Court may think fit.

**Partnership Defined.**—Partnership is the relation which subsists between persons who have agreed to combine their property, labour, and skill, in some business, and to share the profits thereof between them.\*

The business may be some particular transaction or adventure only, as where several persons join in the purchase of goods to be sold on joint account † Co-ownership is not sufficient to constitute a partnership. So when it was agreed that one person should purchase oil, and then divide it amongst himself and others, they paying their proportion of the price, it was held that the purchaser had bought as a principal, and not as an agent for the others, and that there was no partnership between them ‡ and co-owners of a ship are not necessarily partners.§

\* Contract Act, 1872, s. 239.

† See *illus. α*, s. 239.

‡ *Cooper v. Eyre*, 1 H. Bl. 37.

§ *Hyder Ali v. Elahce Bux Maloom*, 1. L. R., 8 Cal. 1011.

One of the tests is the participation in the profits ; but an agreement to share profits does not of itself create a partnership, although it is in general a sufficiently accurate test, for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on, in part, for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade-obligations, and entitled to its profits, or to a share in them. It is not strictly correct to say that his right to share in the profits makes him liable to the trade-debts. The correct mode of stating the proposition is to say that the same thing which entitled him to the one makes him liable to the other, *viz.*, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.\* The question depends upon whether the person carrying on the business acted as agent for the other ; and that is a question of fact, to be gathered from the circumstances of the case.†

**Partnership-suits—Jurisdiction.**—Section 265 of the Contract Act, 1872, is only an enabling section—that is to say, it leaves to the option of the plaintiff either to institute proceedings under that section in the District Court, or to pursue his ordinary remedy by instituting a regular suit in the Court which has jurisdiction, having regard to the pecuniary value of the suit.‡ The section assumes that there has been a partnership, and enables the District Court to wind it up, but does not deprive the ordinary Courts of their jurisdiction in cases seriously contested as to the existence of the partnership.§ but the jurisdiction of the ordinary Civil Courts does not extend to the case of a winding up of an *expired* partnership.|| Such suits are not cognizable by a Court subordinate to a District Court.¶ A suit to compel the defendant to account for, and pay over, a share of a sum realized on a joint speculation, or to provide for the plaintiff's share out of another fund realized under joint orders of the parties, is not a claim to have a partnership wound up, and is therefore not affected by the provisions of section 265 of the Contract Act, 1872.\*\*

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\* *Per* Lord Cranworth in *Cooks v. Hickman*, 8 H. L. C. at p. 306.

† See *Mollwo, March, & Co. v. Court of Wards*, 3 B. L. R., A. C., 238 ; 10 *ib.* at p. 321 ; L. R., 4 P. C. 419.

‡ *Luchman Lall v. Ram Lall*, I. L. R., 6 Cal. 521 ; *Javali Ramasami v. Sathambakam Theruvengadasami*, I. L. R., 1 Mad. 340 ; *Laduthai Premchand v. Revichand Venichand*, I. L. R., 6 Bom. at p. 145.

§ *Kisandas Hajarimal v. Gulabchand*, I. L. R., 8 Bom. 494.

|| *Adarji Dorabji v. Erakshah Dhanji*, I. L. R., 8 Bom. 272.

¶ *Ramayya v. Chandra Sikara Rao*, I. L. R., 5 Mad. 256 ; *Prossad Does Mullick v. Russick Lall Mullick*, I. L. R., 7 Cal. 157 ; *Ram Chunder v. Mannick Chunder*, I. L. R., 7 Cal. 428.

\*\* *Pitchaya v. Narasaya*, I. L. R., 7 Mad. 246.

**Liability of Partners.**—Every partner is liable for all debts and obligations incurred while he is a partner, in the usual course of business, by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.\*

**When Court will Dissolve a Partnership.**—At the suit of a partner the Court may dissolve the partnership in the following cases :—

1. When a partner becomes of unsound mind;
2. When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors;
3. When a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person;
4. When any person becomes incapable of performing his part of the partnership contract;
5. When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners;
6. When the business of the partnership can only be carried on at a loss.†

**Practice.**—A member of an ordinary trading partnership, dissoluble at will, cannot, except under special circumstances, seek an account without praying for a dissolution.‡ The Court may, before making its decree, pass an order fixing the day on which the partnership shall stand dissolved, and directing accounts to be taken.§

**Costs.**—The costs of a partnership-suit should be paid out of the assets, or, in default of assets, by the partners in equal shares, unless any partner renders a suit necessary by denying the fact of a partnership, or by opposing obstacles to the taking of the accounts.||

**Form of Order of Dissolution.**—The form given in the fourth schedule to the Civil Procedure Code is as follows :—

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the       day of       18       , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, &c.

And it is ordered that       be receiver of the partnership estate and effects in this suit, and do get in all the outstanding book-debts and claims of the partnership;

\* Contract Act, 1872, s. 249.

† Contract Act, 1872, s. 254.

‡ Golla Nagabhushanam v. Kanakala Gangayya, 2 Mad. H. C. Rep. 28.

§ C. P. C., s. 215.

|| Ram Chunder Shaha v. Manick Chunder Banikya, 1. L. R., 7 Cal. 423.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property, and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked A, and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the      day of      18      , and that the Registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the      day of      18      .

And lastly it is ordered that this suit stand adjourned for making a final decree to the      day of      18      .

**Form of Final Decree.**—The following is the form of final decree :—

It is ordered that the fund now in Court, amounting to Rs.      , be applied as follows :—

1. In payment of the debts due by the partnership set forth in the Registrar's certificate, amounting in the whole to Rs.      .
2. In payment of the costs of all parties in this suit, amounting to Rs.      .
3. In payment of the sum of Rs.      to the plaintiff as his share of the partnership-assets, of the sum of Rs.      , being the residue of the sum of Rs.      now in Court, to the defendant as his share of the partnership-assets.

(Or, And that the remainder of the said sum of Rs.      be paid to the said plaintiff (or defendant) in part-payment of the sum of Rs.      certified to be due to him in respect of the partnership-accounts).

And that the defendant (or plaintiff) do, on or before the      day of      18      , pay to the plaintiff (or defendant) the sum of Rs.      , being the balance of the said sum of Rs.      due to him, which will then remain due.

### Form No. 340.

#### FOR WINDING UP—AFTER DISSOLUTION.

Plaintiff states :—

1. (Allege partnership as in preceding form).
2. That the said partnership was dissolved (state how) on the      day of      18      .

3. That the defendant has retained exclusive possession of the partnership-books and stock, and ever since has prevented the plaintiff from having access to the same.

Wherefore plaintiff prays that a receiver of the partnership property be appointed with the usual powers, that the defendant be ordered to deliver up the partnership-books and stock, that the accounts of the said partnership-trading may be taken by the Court, &c. (continue as in preceding form).

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**Form No. 341.**

**THE SAME—ANOTHER FORM.**

Plaintiff states:—

1. (Allege formation and purposes of partnership as in preceding form).

2. That on or about the       day of       , by the mutual consent of said partners, the said firm was dissolved.

3. That at such time defendant promised and agreed with the plaintiff to account for and pay over to the plaintiff his proportionate share of all moneys which had been previously collected by the defendant on account of the said firm, and also to collect the debts due to the said firm, and render from time to time to the plaintiff on demand full statements of the debts due to said firm and the payments made on account thereof, and to pay over to the plaintiff his full share of the assets of said firm.

4. That prior and since the dissolution of said firm the defendant has collected large sums of money, amounting to the sum of Ra.       , more or less, on account of the debts due to said firm, and has applied the same and the whole thereof to his own use, and has neglected and refused, and still does neglect and refuse, to account with and pay to the plaintiff his proportionate share of the assets of the said firm so collected as aforesaid, or any part thereof, although often requested by the plaintiff so to do.

(Demand for relief as in preceding form.)

**Notice of Dissolution.**—Section 264 of the Contract Act is not intended to be an exhaustive exposition of the question of notice of a dissolution of partnership. The mode of notification of dissolution required in the case of old customers, who are

known to the firm, as having dealt with it, is an express or specific notice by circular or otherwise; but in the case of the general public the most effectual public notice which can reasonably be given is requisite.\*

**Effect of Assignment—Rights of Assignee.**—The effect of clause 6 of section 263 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the instrument, but only so far void, as between those parties and the other partners, as to cause an immediate dissolution of the partnership. If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership-property.†

**Appointment of Receivers.**—The Court may, under sections 503 of the Civil Procedure Code, and 44 of the Specific Relief Act, appoint a receiver; this power in case of partnership should not be exercised unless after dissolution, or when the plaintiff shows facts which, if proved at the hearing, will entitle him to a decree for dissolution.‡

**Limitation.**—In suits for an account and a share of the profits of a dissolved partnership, three years from the date of the dissolution.§

## CHAPTER IX. QUIETING TITLE.

### Form No. 342.

#### FOR DETERMINATION OF CLAIMS TO IMMOVEABLE PROPERTY.

Plaintiff states:—

1. That A B, late of \_\_\_\_\_, now deceased, was, at the time of his death, the absolute owner of certain property (description).
2. That in his lifetime the said A B made his last will, whereby he devised to the plaintiff all his said property.
3. That the said A B died on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_.
4. That the said property is now, and has been, for \_\_\_\_\_ last past in the actual possession of the plaintiff, and was, during the \_\_\_\_\_ years immediately preceding that period, in the actual possession of the said deceased.

\* Chunder Churn Dutt v. Eduljee Cowasjee Bijnee, I. L. R., 8 Cal. 678.

† Juggut Chundee Dutt v. Rada Nath Dhur, I. L. R., 10 Cal. 669.

‡ Smith v. Teyes, 4 Beav. 508; Chapman v. Beach, 1 J. & W. 504.

§ Art. 106, Limitation Act, 1877.

5. That the defendant unjustly claims an interest (state what) in said property.

6. That the claim of the said defendant is without any right whatever, and that the defendant has not any estate, right, title, or interest, whatever in said land and premises, or any part thereof.

Wherefore plaintiff prays :—

1. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this Court ;
2. That by said decree it be declared and adjudged that the defendant has no interest whatever in said land and premises, and that the title of the plaintiff is good and valid ;
3. That the defendant be for ever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff ; and for such other relief as to this honourable Court shall seem meet and agreeable to equity, and for his costs of suit.

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#### Form No. 343.

#### THE SAME—BY PURCHASER AT EXECUTION SALE.

Plaintiff states :—

1. That defendant A B was the absolute owner of that piece of land (describe it).

2. That on the       day of       18   , C D obtained a decree in the Court of       against the said A B for the sum of Rs.      .

3. That on the       day of       18   , by order of the Court of       , the said land and premises, and all the right, title, and interest of the said A B therein, were sold in execution of the decree aforesaid, and the plaintiff, being the highest bidder at such sale, became the legal purchaser thereof.

4. That said sale was duly confirmed by the Court of       , and on the       day of       18   , said Court issued its sale-certificate as required by law, and forwarded a copy thereof to the Sub-Registrar of       , who registered the same in his book No. 1.

5. That at the time of the passing of said decree, and for several years prior thereto, and at the time of said sale, the said defendant A B had been and was the real owner of said lands and premises.

6. That on or about the       day of       18       , the said A B, being then largely indebted to various persons, and amongst others to the firm of X and Co., and also to the said C D, on the demand for which the decree aforesaid was given, in order to hinder and delay and defraud them in the collection of their debts and demands, made and executed to one E F a conveyance of the above described premises, so purchased by the plaintiff as aforesaid.

7. That the said conveyance was made without any consideration, and was wholly voluntary, sham, and fictitious; and that the said E F held said premises under said conveyance in secret trust for the said A B.

8. That plaintiff avers that by virtue of the purchase by him as above stated he became, and was, and is the owner of said premises; and the conveyance from A B to E F is fraudulent and void, and operates only as a cloud on the title of said plaintiff.

Wherefore plaintiff prays for decree that he is the legal owner of said premises, and that the said conveyance from A B to E F is fraudulent and void and of no force or effect, and for such other and further relief as the case may require, and for the costs of suit.

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Form No. 344.

**TO REMOVE A MORTGAGE WHICH IS A CLOUD UPON TITLE.**

Plaintiff states:—

1. That he is the absolute owner of the following described premises (describe them).

2. (Allege the making of the mortgage, stating facts which show that on its face it appears valid, and that in fact it is void.)

3. That the said mortgage was, on the       day of       18       , duly registered in the office of the Sub-Registrar of       , and recorded in his book No. 1, and now remains a cloud upon the plaintiff's title.

Wherefore plaintiff prays judgment:—

1. That the defendant give up said mortgage to be cancelled, and that the same be cancelled.

2. And for the costs of suit.



## CHAPTER X.

RESCISSION AND CORRECTION OF INSTRUMENTS FOR  
FRAUD AND MISTAKE.

## Form No. 345.

## FOR RESCISSION OF A CONTRACT.

Plaintiff states :—

1. That on the      day of      18      , the plaintiff was the owner of a piece of land (describe it).

2. That the plaintiff then was, and ever since has been, old, infirm, and blind, and wholly incapacitated from attending to business, and the defendants on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form.

3. That the plaintiff is informed and believes that the said writing conveys the said premises and or some interest therein to the defendants; and they intend to use the same for their own benefit, and the prejudice of the plaintiff.

Wherefore the plaintiff demands judgment and decree :—

1. That the said writing is fraudulent and void ;
2. That the defendants produce the said writing, and deliver it up to be cancelled ;
3. For the costs of this suit.

**When Suit Lies.**—The rectification and rescission of contracts is regulated by Chapters III. and IV. of the Specific Relief Act, and sections 19 and 20 of the Contract Act.

By section 19 of the Contract Act contracts founded on coercion, undue influence, fraud, or misrepresentation are *voidable* ; and, by virtue of section 35, clause a, of the Specific Relief Act, the Court may rescind any contract which is voidable or terminable by the plaintiff. By section 20 of the Contract Act mistake of both parties to an agreement renders it *void* ; consequently section 35 of the Specific Relief Act does not apply to such agreements, unless being good on its face it is unlawful in fact, in which case clause b of section 35 would be applicable ; in other cases the proper remedy is under section 39 for the cancellation of the instrument.

Fraud is an obvious ground for rescission of a contract; so where an old man with enfeebled sight was induced to sign his name on the back of a bill of exchange by being told that it was a railway guarantee, to which his signature was wanted; in a suit against him by the holder it was held that he was not liable as an indorsee of the bill.\*

**Oral Evidence of Fraud.**—Oral evidence of the fraud is admissible under proviso i. of section 92 of the Evidence Act.

**Compensation when Awardable.**—In case of rescission or cancellation, the Court may award compensation to the party against whom the relief is granted.†

**Limitation.**—In suits for the rescission of a contract, three years from the time when the facts entitling the plaintiff to have the contract rescinded first become known to him.‡ Article 114 obviously refers to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside.§

### Form No. 346.

#### TO SET ASIDE A DECREE FRAUDULENTLY OBTAINED.

Plaintiff states:—

1. That on the       day of 18       , the plaintiff instituted a suit against the defendant A B in the Court of       to recover the sum of Rs.       , due by the said A B. for goods sold and delivered to him, and such proceedings were had in said suit that on the       day of       18       , a decree was passed against the said A B for Rs.       , and Rs.       , costs of the suit.

2. That on the       day of       , 18       , the defendant C D instituted a suit in the Court of       against the said defendant A B to recover the sum of Rs.       , alleged to be due by the said A B on a document, and procured the said A B to voluntarily attend at the said Court on said day and to confess judgment in said suit; whereupon a decree was passed in favour of the said defendant C D against the defendant A B for Rs.       , and Rs.       , costs.

3. That thereupon the said C D applied for execution of his said decree, and procured an attachment to be issued upon the goods of the said A B, and by virtue thereof the following goods, the property of the defendant A B, were attached (describe the goods, and state their probable value).

\* *Foster v. Mackinnon*, 4 L. E., C. P., 704, at p. 712.

† Ss. 38 and 41, Specific Relief Act.

‡ Art. 114, Limitation Act, 1877.

§ *Bhawani Prasad v. Bisheeshar Prasad*, 1 Weekly Notes 119.

4. That the suit of the said C D against the said A B was collusive and fraudulent, and brought with intent to obstruct and defeat the plaintiff in the recovery of his debt against the said A B; and the said A B never owed the said C D any money whatever on a document or otherwise; and the decree obtained in said suit is fraudulent and void as against the plaintiff.

5. That the said A B is insolvent, and has no visible property except the aforesaid, subject to execution.

6. That the said property is advertised for sale in execution of the said fraudulent and void decree on the        day of        18    , at A. M.; and if the said sale be proceeded with, the plaintiff will be prejudiced to the amount of said property, and will probably lose his said debt, and it will produce on him a great and irreparable injury.

Wherefore plaintiff prays for decree declaring the said decree of the said C D void as against the plaintiff and other creditors of the said A B, and that it and the order for execution thereon may be wholly vacated and annulled, and for such other and further relief as to this Honourable Court may seem wise, and for costs of suit, and that in the meantime the said sale be stayed.

**When Suit Lies.**—A suit will lie to set aside a decree on the ground of fraud;\* but not if the plaintiff urged fraud in the first Court after the decree had been passed, and failing did not appeal, though an appeal was allowed.†

**Presumption as to Bona Fides.**—Honesty and *bona fides* must be presumed in all cases in the absence of evidence to the contrary in every instance in which the conduct of a party to a civil suit is considered, and has to be dealt with by a Court of Justice.‡

**Onus Probandi.**—The burden is on the plaintiff to prove that the decree was fraudulently obtained.§

**Limitation.**—In a suit to set aside a decree on the ground of fraud, or for other relief on the ground of fraud, three years from the time when the fraud becomes known to the party wronged.||

\* *Golab Chunder Baboo v. Prosunno Coomaree Dabia*, 20 W. R. 86; *Flower v. Lloyd*, 6 Ch. Div. 297; see also *Paranjee v. Kanade*, I. L. R., 6 Bom. 148.

† *Rajkissen Mookerjee v. Modosudun Mundul*, 17 W. R. 413.

‡ *Meer Lootf Ali v. Abou Bibee*, 15 W. R. 203.

§ *Greesah Chunder v. Mohesh Chunder*, 10 W. R. 173.

|| Art. 95, Limitation Act, 1877.

Form No. 347.

FOR CANCELLATION OF CONTRACT ON GROUND OF MISTAKE.

Plaintiff states :—

1. That on the       day of       18       , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at       , contained ten acres.

2. That the plaintiff was thereby induced to purchase the same at the price of Rs.       in the belief that the said representation was true, and signed an instrument of agreement, of which a copy is hereto annexed. But no conveyance of the same has been executed to him.

3. That on the       day of       18       , the plaintiff paid the defendant Rs.       as part of such purchase-money.

4. That the said piece of ground contained in fact only five acres.

Wherefore plaintiff prays judgment :—

1. For Rs.       with interest from the       day of       18       ;

2. That the said agreement of purchase be delivered up and cancelled.

**When Suit Lies.**—Under section 39 of the Specific Relief Act the Court may, in its discretion, order any instrument, which is void or voidable, to be delivered up and cancelled, if the plaintiff has a reasonable apprehension that otherwise injury may be caused to him. When, however, a void or voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that such document, if left outstanding, will cause such injury as will entitle the person claiming the cancellation of such document to relief.\*

**Evidence.**—Oral evidence of mistake is admissible under proviso i. of section 92 of the Evidence Act. .

**Mistake of Law.**—A mistake of law does not render a contract void ; but a distinction has been drawn in England between a mistake of general law and mistake in the construction of a document, or as to the existence of a private right. In *Beachamp v. Win*,† Lord Chelmsford observed : “ With regard to the objection that the mistake (if any) was one of law, and that the rule *Ignorantia juris neminem excusat* applies, I would observe, upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well known rule of law.” And in another case Lord Westbury said : “ It is said *Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is

\* *Shib Lal v. Hira Lal*, I. L. R., 1 All. 623.

† L. R., 6 H. L. 223.

used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of law; but if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties; the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it; the mistake is discovered, and the agreement cannot stand."

**Mistake of Foreign Law.**—A mistake as to any foreign law is a mistake of fact,\* and must be proved in the same way.†

**Limitation.**—In a suit to cancel or set aside an instrument, *except for mistake* three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.‡ The words, "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean, "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit."§

In suits for relief on the ground of mistake, three years from the time when the mistake became known to the plaintiff.||

**Court-fee.**—The value of the subject-matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted.¶

### Form. No. 348.

#### TO RECTIFY A CONVEYANCE FOR MISTAKE IN THE BOUNDARY.

Plaintiff states:—

1. That on the       day of       18       , the defendant executed and delivered to the plaintiff an instrument in writing, of which the following is a copy (copy the document).

2. That the description therein given of the premises intended to be conveyed is erroneous, and in fact does not describe any premises whatever (here insert wherein the error lies), and in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows (here insert correct description of the premises).

\* Contract Act, 1872, s. 21.

† Evidence Act, 1872, s. 45.

‡ Art. 91, Limitation Act, 1877.

§ Tawangar Ali v. Kura Mal, I. L. R., 3 All. 394.

|| Art. 96, Limitation Act, 1877.

¶ Gulab Rai v. Mangli Lal, I. L. R., 6 All. 71.

3. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

Wherefore plaintiff demands judgment:—

1. That the said deed be reformed as aforesaid;
2. For costs of this suit.

**When Suit Lies.**—When, through fraud or mutual mistake, a contract in writing does not truly express the intention of the parties, the Court, in its discretion, may rectify the instrument, if this can be done without prejudice to rights acquired by third persons in good faith and for value.\* In these cases the question for the Court to consider is, what was the intention of the parties at the time when the contract was made, and not what they would have done if the result of what they did had been present to them.†

**Practice.**—A contract in writing may be first rectified, and then, if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced.‡

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### Form No. 349.

#### TO CORRECT AN ACCOUNT STATED.

Plaintiff states:—

1. That the plaintiff and the defendant, having had mutual dealings on the      day of      18      , came to an accounting, upon which a statement of said account was made in writing, a copy of which is annexed as a part of this plaint, marked "Exhibit A," whereby a balance of Rs.      was found in favour of defendant.

2. That since the said statement of account, the plaintiff has discovered errors and false charges therein, of which he was wholly ignorant at the time of such settlement.

3. That in the statement of said account so settled he is charged as follows (state items wrongfully charged, and show the error).

4. That the following items, which ought to have been entered to his credit in said account, were, by mistake, wholly omitted therefrom, to wit (specify the items, with date, amount, &c.).

5. That the said account is incorrect, and that the balance thereon should be Rs.      in favour of the plaintiff, instead of Rs.      , in favour of the defendant.

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\* S. 31, Specific Relief Act, 1877.

† *Wilkinson v. Nelson*, 7 Jur., N. S., 490; s. 33, Specific Relief Act.

‡ S. 34, Specific Relief Act, 1877.

6. That as soon as the plaintiff discovered the said errors, to wit, on the      day of      18      , he pointed the same out to the defendant, and then requested the defendant to correct the same, and to restate the said account correctly, but the defendant refused to do so, or to pay the plaintiff any part of the said sum of Rs.      in accordance with the stated account as corrected.

Wherefore plaintiff prays :—

1. That he may be let in to prove the said errors in the stating of the said account, and that the same be corrected ;
2. That decree may be passed against the defendant for the said balance of Rs.      on said corrected account, with interest thereon from the      day of      18      .

## CHAPTER XI.

### SPECIFIC PERFORMANCE.

Form No. 350.

#### PURCHASER AGAINST VENDOR.

Plaintiff states :—

1. That on the      day of      18      , the defendant was the absolute owner of certain immoveable property described in the agreement hereinafter mentioned.

2. That on the same day the plaintiff and defendant entered into an agreement, whereby the plaintiff agreed to buy, and the defendant agreed to sell, the property described therein, of which a copy is hereto annexed.

3. That on the      day of      18      , the plaintiff tendered Rs.      to the defendant, and demanded a conveyance of the said property. (If other conditions were imposed upon plaintiff, aver performance, or offer to perform.)

4. That the defendant has not executed such conveyance (or, that the defendant refused to convey the same to the plaintiff).

5. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

Wherefore plaintiff prays judgment :—

1. That the defendant execute to the plaintiff a sufficient conveyance of the said property (following the terms of the agreement) ;
2. For Rs.                      compensation for withholding the same.

**When Suit Lies.**—Specific performance of a contract may be enforced :—

1. When the act agreed to be done is in the performance wholly or in part of a trust ;
2. When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ;
3. When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ;
4. When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.\*

**Discretion of the Court.**—The jurisdiction to decree specific performance is discretionary ; and the Court is not bound to grant such relief merely because it is lawful to do so ; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal.†

**Damages.**—A claim for compensation may be added to a suit for specific performance, either in addition to, or in substitution for, such performance.‡

**Measure of Damages on a Sale of Land.**—The buyer is entitled to the rents and profits from the date fixed for completion.

**Liquidated Damages.**—Specific performance may be enforced, although a sum is named in the contract as the amount to be paid in case of breach.§

**Limitation.**—In suits for specific performance of a contract, three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.||

### Form No. 351.

#### VENDOR AGAINST PURCHASER.

Plaintiff states :—

1. That by an agreement, dated the        day of        18        , and signed by the defendant C D, he, the said C D, contracted to buy of him certain immovèable property therein described and referred to for the sum of Rs.        .

\* S. 12, Specific Relief Act.

§ S. 20, Specific Relief Act.

† S. 22, Specific Relief Act.

|| Art. 113, Limitation Act, 1877.

‡ S. 19, Specific Relief Act.



2. That he has applied to the said C D specifically to perform the said agreement on his part, but he has not done so.

3. That plaintiff has been, and still is, ready and willing specifically to perform the agreement on his part, of which the said C D has had notice.

Wherefore plaintiff prays for judgment and decree:—

1. That the defendant C D specifically perform the said agreement, and pay plaintiff the said purchase-money, and accept a conveyance and possession of the said property.
2. For costs of suit.

**Measure of Damages.**—The seller is entitled to interest from the date fixed for completion, even though the money were lying dead, if he was not in fault for the delay, or the buyer gave no notice that the money was idle; but if he was in fault, and the money was actually and fully appropriated, and the seller had notice that it was lying dead, he cannot claim interest.\*

### Form No. 352

#### ALLEGATION OF DEFICIENCY OF LAND.

That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said \_\_\_\_\_, and that the same does not contain \_\_\_\_\_ acres, but only \_\_\_\_\_ acres.

Wherefore plaintiff prays for decree:—

1. That a just deduction from the purchase-money be made on account of said deficiency, and that on payment of the residue of said purchase-money, the defendant execute to the plaintiff a sufficient conveyance of the said property;
2. For Rs. \_\_\_\_\_ compensation for withholding the same;
3. For costs of suit.

**Purchaser's Remedy.**—When the seller has contracted to sell an estate larger in extent or interest than he has, the purchaser may compel the seller to convey to him such estate or interest as he is entitled to, with compensation for what he cannot get when, however, the part of a contract which cannot be performed

\* *DeVisme v. DeVisme*, 1 M. & G. 346; *Calcraft v. Roebuck*, 1 Ves. Jr. 227.

† S. 14, Specific Relief Act, 1877; and see *Sugden, V. & P.* 258; *Mortlock v. Buller*, 10 Ves. 315; *Barker v. Cox*, 4 Ch. D. 464; *Peacock v. Henlon*, 11 Beav. 355; *Barnes v. Wood*, L. R., 8 Eq. 424; *Horrocks v. Rigby*, 9 Ch. D. 180; *Hooper v. Smart*, L. R., 18 Eq. 689; *McKenzie v. Heaketh*, 7 Ch. D. 675.

forms a considerable portion of the whole, or does not admit of compensation in money, the Court will not enforce specific performance of the part which can be performed, unless the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.\*

## CHAPTER XII.

### TRUSTS.

#### Form No. 353.

#### BY TRUSTEE FOR EXECUTION OF TRUST.

Plaintiff states:—

1. That he is one of the trustees under an instrument of settlement bearing date on or about the      day of      18      , made upon the marriage of E F and G H, the father and mother of the defendant (or an instrument of assignment of the estate and effects of E F for the benefit of C D, the defendant, and other the creditors of E F).

2. That A B has taken upon himself the burden of the said trust, and is in possession of (or, of the proceeds of) the moveable and immoveable property conveyed (or assigned) by the before-mentioned instrument).

3. That the said C D claims to be entitled to a beneficial interest under the before-mentioned instrument.

4. That plaintiff is desirous to account for all the rents and profits of the said immoveable property (and the proceeds of the sale of the said, or part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust); and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the Court for the benefit of the said C D, the defendant, and all other persons who may be interested in such administration, in the presence of the said C D, and such other persons so interested as the Court may direct, or that the said C D may show good cause to the contrary.

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\* S. 15, Specific Relief Act.

**Trusts Defined.**—A trust is defined in the Specific Relief Act, 1877, as including every species of express, implied, or constructive fiduciary ownership: in England it is defined as a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the legal ownership thereof.\* An express trust is one which is clearly expressed by the author thereof, whether verbally or by writing; an executed trust is one where no act is necessary to be done to constitute it, the trust being finally declared by the instrument creating it; but an executory trust is where there is a mere direction to convey upon certain trusts, and the instrument does not of itself *proprio vigore* constitute the trust, or effect the conveyance which it directs; a constructive trust is one which is raised by construction of equity without reference to any intention of the parties either express or implied; and an implied trust is a trust which is founded on an unexpressed but presumed, i. e., implied intention of the party creating it. With implied trusts are classed resulting trusts.

**Trusts How Created.**—The declaration or creation, and the grant or assignment, of an express trust of lands, tenements, and hereditaments, must be in writing, signed by the party declaring, creating, granting, or assigning such trust, or by will;† and where the Trusts Act, 1882, is in force, trusts of immoveable property must be declared by writing, signed by the author of the trust or the trustee, and registered, or by will; and in case of trusts of moveable property the same must be declared in the same way, unless the ownership of the property is transferred to the trustee.‡

The provisions of the Statute 29 Charles II., c. 3, relating to trusts, have been held to apply to Parsia.§

**Revocation.**—Although there might be cases in which, when no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by him, yet where another is beneficially interested, the deed cannot be revoked.||

**Duties of Trustee.**—By section 19 of the Trusts Act, 1882, a trustee is bound to keep clear and accurate accounts of the trust-property, and, at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property; and when his duties are completed, he is entitled to an examination and settlement of his accounts, and where nothing is due to the beneficiary, to an acknowledgment to that effect.¶

\* M'Fadden v. Jenkins, 1 Ph. 157; Benbow v. Townsend, 1 My. & K. 506; 2 Story's Eq. 964; 2 Spencer's Eq. 875.

† Stat. 29 Charles II., c. 3, ss. 8 and 9.

‡ Stat. 29 Charles II., c. 31, ss. 5 and 6.

§ Bhaimanekbai v. Baimerbai, I. L. R., 6 Bom. 363.

|| Golam Yassin v. The Official Trustee of Bengal, I. L. R., 8 Cal. 887.

¶ S. 35.

**Liability of Trustee.**—Where Act II. of 1882 applies, when co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach;\* but he is not liable merely by reason of signing a receipt for trust-property where he does not receive the same.†

**Settlement Defined.**—Settlement means any instrument (other than a will or a codicil) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of.

**Who May Sue.**—The beneficiary may sue for the specific performance of a trust;‡ and the beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.§

**Religious Trusts—Who May Sue.**—The representative of a testator who has created trusts for religious or charitable purposes may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such powers of enforcing the due administration of such trusts by information at the relation of some private individual, as is possessed by the Attorney-General in England;|| and so can another person interested in the proper observance of a religious endowment.¶ Any person interested in any temple, mosque, or religious endowment, or in the performance of a trust relating thereto, may sue the trustee, manager, or superintendent, or the member of the committee appointed under Act XX. of 1863, for misfeasance.\*\*

**Religious Trusts—Costs.**—Where a suit under Act XX. of 1863 is for the benefit of a trust, and no party to the suit is in fault, e.g., where the right to the succession is disputed, and it is necessary to secure the property, the Court may order the costs to be paid out of the estate; but where a person is in fault, no such order ought to be made.††

**Public Charitable or Religious Trusts.**—In cases of public charitable or religious trusts suit must be instituted by the Advocate-General acting *ex officio*; or where there is no such officer, by the Collector, or by such officer as the local

\* S. 27.

† S. 26.

‡ S. 12, Specific Relief Act, 1877.

§ S. 61, Trusts Act, 1882.

|| *Brigo Mohan Doss v. Harroball Doss*, I. L. R., 5 Cal. 709; 6 C. L. R. 59.

¶ *Kali Ghurn v. Galabi*, 2 C. L. R. 129; *Rachabai v. Chimesji*, I. L. R., 3 Bom. 27; *Rup Narain v. Junko Bye*, 2 C. L. R. 113; *Panch Cowrie v. Chameetal*, I. L. R., 2 Cal. 563.

\*\* *Fakuraddin Sahib v. Acken Sahib*, I. L. R., 3 Mad. 197.

†† *Sookram Doss v. Nund Kishore*, 22 W. R. 21.

Government may appoint, or by two or more persons interested in the trust with the consent, in writing, of the Advocate-General, when the relief claimed is :—

- (a) the appointment of a new trustee ; or
- (b) vesting any property in the trustees under the trust ; or
- (c) declaring the proportions in which the objects of the trust are entitled ; or
- (d) authorizing the whole or any part of the trust-property to be let, sold, mortgaged, or exchanged ; or
- (e) settling a scheme for the management of the trust.

Where the object of the suit is merely to recover the trust-property from outsiders, it does not fall within section 539 of the Civil Procedure Code, and can be proceeded with without making the Advocate-General a party to it.\*

**Parties.**—When the contention in suits concerning trusts is between the persons beneficially interested on the one hand, and a stranger on the other, the trustee shall represent the person interested, and they need not be made parties ;† but it is otherwise when the trustee is wholly uninterested in the matter,‡ or where he has an interest adverse to the beneficiaries.§

**Appointment of Trustee by Court.**—Under Act II. of 1882, when no trustees are appointed, or all the trustees die, disclaim, or are discharged, or when, for any other reason, the execution of a trust by the trustees is or becomes impracticable, the beneficiary may apply to have the trust executed, and to have a trustee or new trustees appointed.||

**Hindu Trusts—Powers of High Court.**—Section 3 of the Trustee's Act, 1866, which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies, without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which English law is in *some measure* applicable ; but in what measure, is not indicated in the Act. English law must be regarded as applicable in the sense intended, if the principles recognized by the English Equity Courts are applicable. At the date of the grant of the Charter to the Supreme Court of Bombay in the year 1823, English Equity had become a system which would deal with a body of *quasi* Common law in a scientific manner, and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the date of the passing of the Indian Trustee's Act, 1866, to all cases in which peculiarly equitable doctrines had obtained recognition.

\* *Lakshmandas v. Ganpatrav*, L. L. R., 8 Bom. 365.

† Civil Procedure Code, s. 437 ; *Hammond v. Walker*, 3 Jur., N. S., 696.

‡ *Clegg v. Rowland*, L. R., 3 Eq. 373.

§ *Payne v. Parker*, L. R., 1 Ch. App. 327.

|| S. 59.

in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native and substantial laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity.

Trusts are recognised by the Hindu law as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud, and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trusts. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee; but with reference to the duties of trustees and the rights of beneficiaries, it is governed by the rules of English Equity. There are no others that it can apply. In meeting an exigency, or in taking cognizance of a form of rights not directly provided for in the *Shastras*, the Court, in exercising its jurisdiction under section 41 of the Charter of 1823, may apply Hindu law; but taking Hindu law as one of its data, it applies "English law" also, in the form of equity, to all or nearly all the questions that arise.\*

**Limitation.**—By section 10 of the Limitation Act, 1877, notwithstanding anything thereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representative for assigns (not being assigns for valuable consideration), or the purpose of following in his or their hands such property, shall be barred by any length of time.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property, and for an account, is a suit to follow property, and, as such, is not barred by any lapse of time.†

## CHAPTER XIII. VENDORS' LIENS.

### Form No. 354.

#### BY VENDOR AGAINST PURCHASER TO ENFORCE LIEN.

Plaintiff states:—

1. That on the       day of       18       , at       , the plaintiff sold and conveyed to the defendant       acres of land, situated (describe the premises), for which the defendant agreed to pay the plaintiff the sum of Rs.       (state terms of sale).

2. That no part of the said sum of Rs.       has been paid by the defendant.

\* *In re Kahandas Narandas*, I. L. R., 5 Bom. 154.

† *Hurro Coomaras Dass v. Tarini Churn Bysack*, I. L. R., 8 Cal. 766.

3. That the plaintiff has a lien as vendor upon said premises for the payment of said purchase-money, which he claims in this suit.

Wherefore plaintiff prays—

1. For a decree for the said sum of Rs.                      , with interest from the                      day of                      18                      , and the costs of suit ;
2. That it may be decreed that the plaintiff has a lien upon said premises for the amount of said decree, and that the same may be sold, and the proceeds applied to the payment of said decree, and that he may have execution against the defendant for any deficiency, and for such other and further relief as may be proper.

**Vendor's Lien.**—The vendor has an equitable lien upon immoveable property sold, whatever may be its tenure, for so much of the purchase-money as in fact remains unpaid ; the lien is valid against sub-purchasers with notice claiming under the first purchaser ; and sub-purchasers or mortgagees, even without notice, are postponed, unless they have the legal estate, or a better equity, or the title-deeds.\*

**Lien How Lost.**—In general the taking of an independent security will be evidence of an intention to abandon the lien ; but such an intention will not be implied where the vendor takes a note, bill, or bond, for the purchase-money, even if the same be signed by a third person.†

**Limitation.**—In suits by a vendor of immoveable property to enforce his lien for unpaid purchase-money, three years from the time fixed for completing the sale, or when the title is accepted after the time fixed for completing the date of the acceptance.‡

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### Form No. 355.

#### BY VENDOR AGAINST PURCHASER AND HIS GRANTEE.

Plaintiff states :—

1 and 2. (As in preceding form.)

3. That the defendant C D purchased the said premises of the defendant A B with the full knowledge that the said A B had not paid the said purchase-money, and took a conveyance from the said A B to him for the said premises.

(Conclude as in preceding form.)

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\* Dart. V. & P. 729, 730.

† Dart. V. & P. 733, 734.

‡ Art. 111, Limitation Act, 1877.

# PART II.—DEFENCES.

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## FIRST DIVISION. SUITS ON CONTRACT.

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### FIRST SUB-DIVISION. DEFENCES GENERALLY APPLICABLE.

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#### CHAPTER I. DEFENCES AFFECTING PROCEDURE.

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##### Form No. 356.

##### AMBIGUITY OF PLAINT.

That the plaint is ambiguous, unintelligible, and uncertain. (Point out specially in what the ambiguity or uncertainty consists.)

**Essential Allegations.**—Each cause of action should be separately and distinctly stated; and each separate and distinct proposition of each cause of action should be separately set forth in logical order, leaving the conclusions of law deduced therefrom to be drawn by the Court.

**Practice.**—A plaint may be rejected if it is intentionally obscure,\* and this even after it has been registered.†

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##### Form No. 357.

##### ANOTHER SUIT PENDING.

That there was, at the commencement of this suit, and still is, another suit pending, between the same parties, for the same cause, in the Court of \_\_\_\_\_, a Court of competent jurisdiction.

**Essential Allegations.**—The written statement should show that there is another suit pending in a Court in British India, or in a Court beyond British India, established by the Governor-General, of competent jurisdiction, between the same parties, litigating under the same title, and that the subject-matter in controversy is the same.

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\* *Mahomed Hossain v. Potun*, 20 W. R. 147.

† Civil Procedure Code, s. 53; and see *Chetti Gaundan v. Sundaram Pillai*, 2 Mad. 51.



**PART II.**      **Practice.**—By section 13 of the Civil Procedure Code the Courts are precluded from trying any suit in which the matter in issue is also in issue in a suit *previously instituted* in any domestic Court; suits in foreign Courts are by the explanation expressly declared not to be within this rule.

**DIV. I.**  
**Suits on Contract.**

A suit filed in the District Munsif's Court on the same day as a suit brought in the Small Cause Court for the same cause of action is no bar to the suit in the Small Cause Court; but the plaintiff must elect which suit he will proceed with.\*

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### Form No. 358.

#### COMPROMISE.

1. (State demand set up by the plaintiff.)
2. That afterwards, on the      day of      18      , at      , the defendant agreed to pay, and the plaintiff agreed (in writing) to accept, Rs.      , in full satisfaction of said claim, as a compromise thereof.
3. That on the      day of      18      , the defendant paid, and the plaintiff so accepted, the said sum.

**Construction of Instruments of Compromise.**—General words used in a deed of compromise or in a release must be confined to matters of the same nature, and forming part of the transaction which the parties had in view.†

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### Form No. 359.

#### DEFECT OF PARTIES.

That G H should be made a plaintiff (or defendant) in this suit (state why).

**Practice.**—The Court should not dismiss a suit for defect of parties merely, but should exercise the discretion vested in it by section 32 of the Civil Procedure Code; but a Court is not competent to allow of the introduction into a suit of a party against whom no relief is sought by the plaintiff.‡

The objection must be taken on or before the first hearing;§ but the Court may of its own motion add parties at any time; this discretion to add parties should be

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\* Subbramanyan v. Ganapathi, I. L. R., 2 Mad. 123.

† Leelanand Singh v. Hamidooddin, I. L. R., 8 Cal. 576; see also Directors of L. & S. W. Ry. Co. v. Blackmore, L. R., 4 H. L. 610.

‡ Moharasee Sarnomoyee v. Bykunt Chunder Mustofee, 25 W. R. 17.

§ Ruchpaul v. Johuree, 2 Agra H. C. R. 147; Jowabali Mohah v. Gulam Assad Chowdhry, 21 W. R. 187.

exercised whenever it appears desirable, in order to prevent a multiplicity of suits, to bind all persons interested once for all, but this should not be done to the prejudice or delay of the plaintiff.\*

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

Form No. 360.

FORMER DECREE.

That on the        day of        18       , in a suit then pending in the Court of        between A B plaintiff, and C D defendant, and for the same cause of action as that set forth in the plaint herein, decree was duly passed (describe the decree).

**Res Judicata.**—Section 13 of the Civil Procedure Code runs as follows :—  
“No Court shall try any suit or issue in which the subject-matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard, and finally decided.

In England it was held in the case of *Leggatt v. Great Northern Railway Company*,† that where the issue is the same, and the parties are the same, the finding of the jury is conclusive, whether the cause of action is the same or not; and in Calcutta it has been held that where the parties are the same, the thing claimed the same, and the parties sue and are sued in the same character, the previous suit will be a bar, whether the grounds of action be the same or not.‡

If the cause of action is based on a right identical in both suits, or on the same group of facts infringing that right, the second suit is barred.§

When a judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal.¶

A decision is no less *res judicata* because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved.¶

\* *The Swansea Shipping Co. v. Duncan, Fox & Co.*, 1 Q. B. D. 644; *Bower v. Hartley*, 1 Q. B. D. 652, *per* Mellish and James, JJ.

† 1 Q. B. D. 602.

‡ *Denubundhoo Chowdhry v. Kristomonee Dossee*, 1 L. R., 2 Cal. 152.

§ *Haji Hasam Ibrahim v. Manoharam Kuliandas*, 1 L. R., 3 Bom. 137.

¶ *Nilvaru v. Nilvaru*, 1 L. R., 6 Bom. 110.

¶ *Gowri Koer v. Ansh Koer*, 1 L. R., 10 Cal. 1087.

**PART II.** It is not what the Judge may say in his judgment, but what is directed by the  
**Defences.** decree, is *res judicata*;\* but in order to determine what the decree really decides, it  
 is essential to see what were the rights in dispute between the parties.†

**DIV. I**  
**Suits on**  
**Contract.** The decision relied on must be that of a Court competent to try the subsequent  
 suit;‡ a decree of a Court not of competent jurisdiction is no bar.§

Where the suit is a continuing one, as a suit for an account, the previous suit  
 will be no bar.||

**Foreign Judgments—When a Bar to Suit in India.**—No foreign  
 judgment shall operate as a bar to a suit in British India :—

- (a) If it has not been given on the merits of the case ;
- (b) If it appears on the face of the proceedings to be founded on an incorrect  
 view of international law, or of any law in force in British India ;
- (c) If it is in the opinion of the Court before which it is produced contrary to  
 natural justice ;
- (d) If it has been obtained by fraud ;
- (e) If it sustains a claim founded on a breach of any law in force in British  
 India.¶

In a suit against a native of British India not residing in the foreign country,  
 upon a cause of action which arose in British India, there is no duty in the defend-  
 ant to attend the foreign Court and defend the suit, and consequently an *ex-parte*  
 judgment of such foreign Court imposes no duty on the defendant to pay the amount  
 decreed so as to bar a suit in British India. Such a case comes under clause b of  
 section 14 of the Civil Procedure Code.\*\*

**Foreign Judgments—Essential Allegations.**—In pleading a foreign  
 judgment in bar of a suit in India a general averment of jurisdiction is sufficient,  
 as, by explanation vi. of section 13 of the Civil Procedure Code, the judgment  
 duly authenticated is presumptive evidence that the Court which made it had com-  
 petent jurisdiction, unless the contrary appear on the record.

\* *Mohan Lal v. Ram Dial*, I. L. R., 2 All. 848; *Devarakonda Narasamma v. De-  
 varakonda Kanaya*, I. L. R., 4 Mad. 134; *Annsuyabai v. Sakaram*, I. L. R., 7 Bom. 464;  
 see also *per Sir Barnes Peacock* in *Soorjomonee Dayee v. Suddanund Mohapaster*, 12  
 B. L. R. at p. 304; *Manappa Madali v. S. T. McCarthy*, I. L. R., 8 Mad. 192.

† *Robinson v. Duleep Singh*, 11 Ch. Div. 798 at p. 818.

‡ *Civil Procedure Code*, s. 13; *Misir Raghobardial v. Sheo Baksh Singh*, I. L. R.,  
 9 Cal. 439.

§ *Poboli Mullick v. Fukeer Chunder Patnaik*, 22 W. R. 349; *Chunder Narain  
 Mojoomdar v. Prithanund Asrum*, 12 W. R. 290; *Mussamut Ranees Gunesch Koor v.  
 Mussamut Oomdut Oonnissa Begum*, 6 N.-W. P. 77; *Kalka Parahad v. Kanhaya Singh*,  
 7 N.-W. P. 99.

|| *Roy Dinkur Doyal v. Sheo Golam Singh*, 23 W. R. 172.

¶ *Civil Procedure Code*, s. 14.

\*\* *Hinde & Co. v. Ponnath Brayan*, I. L. R., 4 Mad. 359.

**When Plea of Res Judicata may be Taken.**—Where the plea of *res judicata* was not raised until after all the evidence had been taken, it was held that the Court should consider it;\* and even when this plea had not been raised either in the Court of first instance or in first appeal, if raised in second appeal it must be considered and determined either upon the record as it stands, or after a remand for findings of fact.†

PART II.  
Defences.

DIV. I.  
Suits on  
Contract.

### Form No. 361.

#### INFANCY OF PLAINTIFF.

That the plaintiff is not of the age of eighteen years (or at the commencement of this suit the plaintiff was not of the age of eighteen years), and has no guardian appointed herein.

**Practice.**—Every suit by a minor shall be instituted in his name by an adult person, who, in such suit, shall be called the next friend of the minor, and may be ordered to pay any costs in the suit, as if he were the plaintiff.‡ As to who is entitled to institute or defend a suit on behalf of a minor, see the chapter herein, entitled “Minors,” page 13.

Where there is no guardian appointed under any local law, the Court may, under section 445 of the Civil Procedure Code, appoint *any* person of sound mind and full age, whose interest is not adverse to that of the minor, and who is not himself a defendant, to be the next friend of the minor.

### Form No. 362.

#### LIMITATION.

That the cause of action set forth in the plaint did not accrue within \_\_\_\_\_ years before commencement of this suit; and the plaintiff's claim is therefore barred by clause \_\_\_\_\_ of Schedule II. of Act XV. of 1877.

**Construction of Limitation Acts.**—A Limitation Act, being restrictive of the ordinary right to take legal proceedings, must, where the language is ambiguous, be construed strictly, i.e., in favour of the right to proceed.§ Statutes of Limitation are in their nature strict and inflexible enactments, and ought to receive such a construction as the language in its plain meaning imports;|| and where the

\* *Ran Bahadoor Singh v. Luchoo Koor*, 1 L. R., 6 Cal. 406.

† *Muhammad Ismail v. Chatter Singh*, 1 L. R., 4 All. 69.

‡ Civil Procedure Code, s. 440.

§ *Uma Shankar Lakhmiram v. Chhota Lal Vajeram*, per Westropp, C.J., 1 L. R., 1 Bom. 19 at p. 22; *Balvantrav v. Pureshotam Sidheshvar*, 9 Bom. 99 at p. 111.

|| *Luchmee Bukah Roy v. Runjeet Ram Panday*, 13 Beng. P. C. 177; 20 W. R. 375; see also *Syed Mahomed Afsul v. Kanhya Lal*, 2 W. R. 263.

**PART II.** language of an Act of Limitation specifies the particular cases for which a period of limitation is provided, the Court ought not to interpret that language so as to include cases not falling within the strict meaning of the words used.\*

**Defences.**  
**Div. I.**  
**Suits on Contract.**

**Application of Limitation Acts.**—The applicability of particular sections of the general statute of limitation must be determined by the nature of the thing sued for, and not by the *status*, race, character, or religion of the parties to the suit. The period of limitation within which the claim is barred must be fixed and uniform, by whomsoever that claim is preferred or resisted.†

No Court has power to extend by indulgence the period of limitation, but when it is shown that a remedy is barred by limitation, it has only to apply the law, and refuse the remedy;‡ and this although limitation has not been set up as a defence,§ and at any stage of the proceedings.

It is the duty of the plaintiff, if his cause of action arose beyond the time ordinarily allowed for instituting his suit, to state in his plaint the grounds on which exemption from the Limitation Law is claimed, and the Court must reject the plaint if it is barred by lapse of time.||

**Consent of Parties.**—When a cause of action has once accrued the prescribed period of limitation cannot be extended even on the agreement of the parties.¶

**Defendants Not Bound by Limitation Acts.**—The Limitation Act, 1871, does not in terms apply to defendants; and it does not follow that a defendant cannot set up a right by way of defence which he would be precluded by the Limitation Act from setting up as a plaintiff by way of substantive claim.\*\*

**Doctrine of Laches and Acquiescence.**—The equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act;†† the Courts of this country have not power to refuse relief on the ground of mere delay when plaintiff establishes a right not affected by limitation.‡‡ But where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, and the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea, if sufficiently proved, ought to be held a good answer to an action, although

\* *Ram Sunkar Bhadoory, In re*, 3 O. L. B. 440.

† *Maharana Futehsangli v. Dessai Kullianraji Hekoomutraji*, 13 Beng. C. P. 254, at p. 265; 21 W. R. 178.

‡ *Sadho Singh v. Musumut Kishnee*, 3 N. W. P. 318.

§ Limitation Act, 1877, s. 4.

|| See ss. 50 and 54, cl. c, C. P. C.

¶ *East India Company v. Odichurn Paul*, 5 M. J. P. 43.

\*\* *Ram Narain v. Poolin Beharey*, 2 C. L. B. 5.

†† *Ram Rau v. Raju Rau*, 2 Mad. H. C. B. 114; *Peddammuthulaty v. N. Timma Reddy*, 2 Mad. H. C. B. 270; *Taruok Chunder Bhuttacharjee v. Huro Sunkar Sandyal*, 22 W. R. 267; *Sheikh Alij Hossein v. Sheikh Muskur Hossein*, 4 O. L. B. 577.

‡‡ *Ramphul Sahoo v. Misree Lal*, 24 W. R. 97.

the plaintiff may have brought his suit within the period prescribed by the law of PART II. Limitation.\* This is also the principle followed in England.† But to constitute a Defences. bar by acquiescence both parties must be acquainted with all the material facts, and the conduct of the party entitled to offer opposition to the act of the other must be such as to give rise to a reasonable belief of his consent, and the other must have been induced thereby to do something from which he might otherwise have abstained.‡

Div. I.  
Suits on  
Contract.

### Form No. 363.

#### MISJOINDER OF CAUSES OF ACTION.

That several causes of action have been improperly united (state how).

**Practice.**—An objection for misjoinder of causes of action must be taken in the Court of first instance.§

For the kind of claims which may be joined with a suit to recover immoveable property, or for declaration of title to immoveable property, see section 44 of the Civil Procedure Code; all other claims may be joined in one suit. The Court may, however, order separate trials when it considers that they cannot be conveniently tried together;|| but this does not mean that the plaintiff must then file separate plaints in each case separately tried.¶

The defendant may apply, at any time before the first hearing, or, where issues are settled, before any evidence is recorded, for an order confining the suit to such of the causes of action as may be conveniently disposed of in one suit.\*\*

### Form No. 364.

#### MISJOINDER OF PARTIES.

That A B is improperly made a plaintiff (or defendant) in this suit (state why).

**Practice.**—No suit shall fail by reason of misjoinder of parties.†† The Court has, under section 27 of the Civil Procedure Code, a discretion, where there has been a *bond fide* mistake, to substitute or add a party plaintiff; and under section 32 the Court may order the name of any party, whether plaintiff or defendant, improperly joined, to be struck out.

\* Uda Begam v. Imam-ud-din, I. L. R., 1 All. 83.

† Archbold v. Scully, 9 H. L. 383.

‡ See Darby and Bosanquet, pp. 351, 352; Banning, pp. 246, 247.

§ Dhondiba Krisnaji Patel v. Ram Chander Bhagvat, I. L. R., 5 Bom. 554.

|| Civil Procedure Code, s. 45.

¶ Musumut Ratta Bebee v. Dumree Lal, 2 N.-W. P. 153.

\*\* Civil Procedure Code, s. 46.

†† Civil Procedure Code, s. 31.

PART II.  
Defences.

## Form No. 365.

## MISNOMER.

Div. I.  
Suits on  
Contract.

That the true name of the plaintiff (or of defendant) is and ever has been \_\_\_\_\_, and not \_\_\_\_\_, in which name he sues (or is sued).

**Practice.**—Misnomer of a plaintiff or defendant must be pleaded, whether the party be an individual or a corporation, otherwise a mistake in the name will be considered as waived.

**Misnomer of Defendant.**—The description contemplated by the Code includes all the titles by which the party is generally known; and if a party, from obstinacy or pique, or anything in fact but a *bond fide* dispute, as to the right to a title, persistently refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit, nor sanction, that species of insult. When the defendant objected that his titles were not set forth, and asked that he might be described as in the Government Gazette, "The Honorable Maharajah Meerja Vijaya Rama Gujapati Raz Manee Sultan Bahadur, Guru of Vizianagram," and the plaintiff was granted a week to amend, but did not, it was held by the Privy Council that, with the exception of the word "Honorable," which seemed less a matter of description than an honorary distinction as applied to members of Council, the Judge was right in insisting on the titles, and in rejecting the plaint on non-compliance, as the titles could not be rationally disputed.\* In this case their Lordships disapproved of the ruling in *Kishen Chand Goleecha v. Meghraj Kobbria Roy Bahadoor*,† in which the High Court at Calcutta refused to insist on the insertion of the words "Roy Bahadoor."

## Form No. 366.

## NON-JOINDER OF JOINT OWNER.

That A B and C D, residing at \_\_\_\_\_, are tenants in common with the plaintiff in said lands, and necessary parties to this suit.

## Form No. 367.

## NON-JOINDER OF JOINT PROMISEE.

That the contract (or other cause of action) mentioned in the plaint was made with said A B, plaintiff, and one C D, jointly.

## Form No. 368.

## THE SAME—ANOTHER FORM.

1. That the goods described in the plaint were sold by plaintiff and one C D as partners under the name of A B & Co.

\* *Sri Raja Seta Rama Krishna v. Sri Raja Vijaya Rama Gajapaty*, 3 Mad. 31; 18 W. R. 301.

† 12 W. R. 450.

2. That the said C D is still living (or, that the said C D died on or about the day of 18 , and E F is his legal representative).

PART II.  
Defences.

**Non-joinder of Joint-promisee.**—One joint-promisee cannot sue by himself either for the whole of the debt or for his share.\*

DIV. I.  
Suits on  
Contract.

When one joint-promisee is dead, his representative should be joined as a plaintiff,† or, if he refuses, as a defendant.

**Non-joinder of Joint-debtor.**—It is no defence that one of several joint-debtors has not been made a party, as under section 43 of the Contract Act, 1872, the promisee may compel any one of the joint-promisors to perform the whole of the promise; but the defendant may apply under section 32 of the Code of Civil Procedure to have his co-promisor added as a defendant, and if it appears that his appearance before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, it will order such co-promisor to be added.

**Objection when to be Taken.**—All objections for want of parties must be taken before the first hearing.‡

### Form No. 369.

#### PLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

That the plaintiff does not state facts sufficient to constitute a cause of action.

**Practice.**—When the plaintiff does not disclose a cause of action, the Court may either reject it, or order it to be amended;§ but the Court is justified in examining the pleadings on both sides, and from their examination eliciting and fixing the real issues, and determining the case on the trial of such issues.||

An objection as to the plaintiff having no cause of action may be taken at any stage of the suit.¶

### Form No. 370.

#### WANT OF CAPACITY TO SUE.

That the plaintiff has not legal capacity to sue (state reason why).

**Practice.**—Incapacity to sue is a defect not admitting of cure, and the Court is bound to consider it, though urged for the first time in special appeal.\*\*

\* *Ramsebuk v. Ramlall Koondoo*, L. L. R., 9 Cal. 815.

† Contract Act, 1872, s. 45.

‡ Civil Procedure Code, s. 34.

§ Civil Procedure Code, s. 53.

|| *Man Gobind Siroar v. Umbika Monee Dossia*, 16 W. R. 218.

¶ *Parbati Charan Mukhopadhyaya v. Kalinath Mukhopadhyaya*, 6 B. L. R. App. 73.

\*\* *Radha Kishen v. Bakhtawur Lal*, 1 Agra, F. B., 173.



PART II.  
Defences.

Form No. 371.

Div. I  
Suits on  
Contract.

WANT OF CAPACITY—ALIEN ENEMY.

1. That the plaintiff was not, at the commencement of this suit, and is not now, a subject of Her Majesty, but was and is an alien, born in \_\_\_\_\_, out of the allegiance of Her Majesty, and within the Kingdom of \_\_\_\_\_.

2. That at the commencement of this suit the Government of said \_\_\_\_\_ was, and still is, at war with, and is now an enemy of, Her Majesty.

3. That the plaintiff then was, and still is, an alien enemy, abiding without British India, and at \_\_\_\_\_, within the said \_\_\_\_\_, and adhering to the said enemies of Her Majesty.

**Alien Enemy Defined.**—The explanation to section 430 of the Civil Procedure Code gives the following definition of "alien enemy residing in a foreign country": "Every person residing in a foreign country, the Government of which is at war with the Government of the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State, or of a Secretary to the Government of India."

**Incapacity of Alien of Enemy.**—By section 430 of the Civil Procedure Code, alien enemies residing in a foreign country, or residing in British India without permission of the Governor-General in Council, are incapable of suing in our Courts.

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Form No. 372.

WANT OF CAPACITY—ASSIGNMENT.

That before the commencement of this suit, and on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the plaintiff duly assigned the subject-matter and cause of action set forth in the plaint to one A B, who then was, and has been ever since, the holder thereof.

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Form No. 373.

WANT OF CAPACITY—DENIAL OF PLAINTIFFS' INCORPORATION.

1. That there was not at the commencement of this suit, nor is there now, any such company as the \_\_\_\_\_ company, named as plaintiff in this suit.

2. That the plaintiff was not a *de facto* company, nor did the persons claiming to compose the said alleged company, at the commencement of this suit, claim in good faith to be a company.

PART II  
Defences.  
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Suits on  
Contract.

Form No. 374.

WANT OF CAPACITY—DENIAL OF DIRECTORSHIP.

That since the expiration of the said first year (or after the day of 18 ), he has not been a director of said company, and has not in any way managed the affairs or concerns of said company as such.

Form No. 375.

WANT OF JURISDICTION.

That the Court has no jurisdiction of the person of the defendant (or of the subject-matter of the suit—state why).

**Practice.**—A Court cannot try a case without jurisdiction, even with the consent of parties,\* and the submission of defendant cannot oust the jurisdiction of the Appellate Court to set aside the decision.† An Appellate Court cannot treat a plea to jurisdiction as a technical plea which may be disregarded if the Court is satisfied with the decision on the merits.‡

When an objection to the jurisdiction has been raised and allowed in an early stage of the suit, the plaint should be returned to be presented in the proper Court,§ even though the suit has been registered,|| in fact at any stage of the suit,¶ and even after the trial has concluded,\*\* but not after decree has been passed by ultimate Court of Appeal.††

**Test for Jurisdiction.**—Whether a Court has jurisdiction or not in a suit, depends not on the value of the ~~claim~~ according to the rules of the Court Fees Act, but upon the ~~subject~~ or value of the subject-matter in dispute, i.e., the actual market

\* Roy Bhoopendro Nath Chowdhry v. Kales Prosunno Ghose, 24 W. R. 205.

† Roy Bhoopendro Nath Chowdhry v. Kales Prosunno Ghose, *supra*; Government v. Ranmalisingji Amarsingji, 9 Bom. H. C. R. 242; Ankhil Chunder Sen v. Mohini Mohun Doss, 4 C. L. R. 491; Foster v. Underwood, 3 Ex. Div. 1.

‡ Keshava Sanabhaja v. Lakshminarayana, I. L. R., 6 Mad. 192.

§ Khooal Chund v. Palmer, 2 Agra H. C. R. 290.

|| Khanda Moraghrav v. Shivji Bin Gorkoji, 5 Bom. 12; Kavasji Framji v. Wallace, 1 Bom. 112.

¶ Bhadeshvar Chowdhry v. Gouri Kant Nath, I. L. R., 8 Cal. 824; 11 O. L. R. 200.

\*\* Prabhakarbal v. Vishvambhar, I. L. R., 8 Bom. 212.

†† In re Bai Amrie, I. L. R., 8 Bom. 389.

**PART II.** value of what the plaintiff is suing for,\* which should be estimated by the aid of the best evidence available bearing on the actual value.† In a recent case the Bombay

**DIV. I.** High Court have held that what determines the jurisdiction of a Court, is the claim, or subject-matter of the claim, *as estimated by the plaintiff*; and the determination having given the jurisdiction, the jurisdiction itself continues, whatever the event of the suit, and this is so notwithstanding a *bond fide* error in the estimate made by the plaintiff.‡

**Suits on Contract—Where to be Instituted.**—In suits on contract plaintiff may bring his suit either in the Court of the place where the contract was made, or in that of the place where it was to be performed.§

**Acts of State.**—The Courts have no jurisdiction to entertain a suit against Government on account of any act done, or contract entered into, in the exercise of powers usually called sovereign, that is, powers which cannot be lawfully exercised except by a sovereign, or by a private individual delegated by a sovereign to exercise them, or on account of any act done by officers and soldiers carrying on hostilities, or for the acts of any naval officers in seizing a prize, the property of a subject, under the supposition that it was the property of an enemy, or for any act done by a military or naval officer or any soldier or sailor whilst engaged in military or naval duty, or for the acts of its officers or servants, in the exercise of judicial functions; but the Government is liable for the acts done by public servants in the conduct of undertakings which might be carried on by private individuals without having any sovereign powers delegated to them.¶ But where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Civil Courts.¶

**Small Cause Courts—Suits for Contribution.**—The general rule is that a suit for contribution does not lie in a mofussil Small Cause Court in the

\* *Chunder Nath v. Brindabun Shaha*, 25 W. R. 39; *Kirty Churn Mitter v. Annath Nath Deb*, I. L. R., 8 Cal. 757; 11 C. L. R. 95; *Dayachand Hemchand v. Hemchand Dharamchand*, I. L. R., 4 Bom. 515; *Bai Makhor v. Bulakhi Chakr*, I. L. R., 1 Bom. 1; *Kalu Bhiwaji v. Vishram Mawaji*, I. L. R., 1 Bom. 543; *Jeebraj Singh v. Inderjeet Mahton*, 18 W. R. 109.

† *Nanhuon Singh v. Toofanee Singh*, 20 W. R. 33.

‡ *Lakshman v. Babaji*, I. L. R., 3 Bom. 31; see also *Joy Doorga Dass v. Manick Chand Baboo*, 16 W. R. 243.

§ *Gopi Krishna Gossami v. Nil Komal Banerjee*, 13 B. L. R. 461; 22 W. R. 79; *Lucknowe Chund v. Zorawur Mull*, 8 M. J. A. 291; *Prem Shook v. Bhakoo*, 3 Agra H. C. R. 242; *Hills v. Clark*, 14 B. L. R. 367; *Sami Ayyangar v. Gopal Ayyangar*, 7 Mad. H. C. R. 176; *Mahomed Abdul Kader v. E. I. Ry. Co.*, I. L. R., 1 Mad. 377; *Laljee Lall v. Hardury Narain*, I. L. R., 9 Cal. 105; 11 C. L. R. 125.

¶ *P. & O. S. N. Co. v. Secretary of State*, Bourke, 167; 5 Bom. H. C. R. App. 1.

¶ *The Secretary of State v. Hari Bhanji*, I. L. R., 5 Mad. 273.

absence of a contract to contribute.\* Therefore a suit for contribution for money paid by one judgment-debtor in satisfaction of a joint-decree against him and others cannot be entertained by a Court of Small Causes, which cannot deal with questions of equity ;† nor a suit for contribution between coparceners in a revenue-paying estate, or for contribution between coparceners in a jama ;‡ but a suit by one surety against another for contribution, when the sureties are bound by the same instrument, is a suit on an implied contract, and therefore within the jurisdiction of a Court of Small Causes.§

PART II.  
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Contract.

**Small Cause Courts—Seamen's Wages.**—Civil Courts (including Small Cause Courts) have jurisdiction to try suits for wages brought by seamen against the master, whatever the nationality of the vessel.||

**Small Cause Courts—Suit for Property Attached.**—A suit to recover moveable property attached in execution of a decree, and damages for its wrongful attachment, and to set aside the order disallowing an objection to be taken to its attachment, is not a suit cognizable by a Court of Small Causes ;¶ nor a suit for a declaration of title to such property, and for its recovery by the removal of attachment ;\*\* nor a suit by a decree-holder to establish his right to attach and sell certain property as belonging to his judgment-debtor.††

## CHAPTER II.

### DEFENCES AFFECTING THE CONTRACT.

#### Form No. 376.

#### ACCORD AND SATISFACTION.

That on the       day of       18       , at       , he delivered to the plaintiff the promissory note of B C for Rs.       , and the plaintiff accepted the same in full satisfaction and discharge of the claim set up in the plaint.

\* *Rambux v. Mudhoosoodun*, B. L. R. Sup. Vol. 675 ; 7 W. R. 377.

† *Ramjoy v. Joy Nath*, I. L. R., 9 Cal. 395 ; *Shaboo v. Noorai*, B. L. R. Sup. Vol. 691 ; but see *contra* *Goomdo v. Bapu*, 5 Mad. H. C. R. 200.

‡ *Nobin Krishna v. Ramkumar*, I. L. R., 7 Cal. 605.

§ *Hari Trimbak Akolkar v. Abasaheb*, I. L. R., 4 Bom. 321.

|| *Fritz Olner v. Lavezzo*, I. L. R., 10 Cal. 879.

¶ *Mahkund Lal v. Nasir-ud-din*, I. L. R., 4 All. 416.

\*\* *Imhi Baksh v. Sita*, I. L. R., 5 All. 462 ; *Shiboo Narain v. Madden Ally*, I. L. R., 7 Cal. 608 ; but see *contra* *Nathu Ganesh v. Kalidas*, I. L. R., 2 Bom. 365 ; *Gordham Prama v. Karsandas*, I. L. R., 2 Bom. 179.

†† *Chhaganlal v. Jesham Rao*, I. L. R., 4 Bom. 303.

## 312 SUB-DIV. I.—DEFENCES GENERALLY APPLICABLE.

**PART II.**      **Definition.**—Accord and satisfaction means that something is given or done  
**Defences.** by the defendant to or for the plaintiff, and accepted by the latter on a mutual  
**Div. I.**      agreement that it shall be a discharge of a cause of action. The agreement is the  
**Suits on**  
**Contract.**      accord, and the thing done or given is the satisfaction.

**Essential Allegations.**—The defence of accord and satisfaction must be pleaded, and the facts relied on fully set out in the written statement of defence, showing a payment or delivery, and a receipt in satisfaction. A mere readiness to perform, or a tender of performance, or a part performance and readiness to perform the rest, is not enough.

**Effect of Plea.**—Under section 63 of the Contract Act the receipt by the promisee of any satisfaction instead of the thing promised operates as a complete discharge.\*

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### Form No. 377.

#### ARBITRATION AND AWARD.

1. That on the      day of      18      , the plaintiff and defendant (in writing) mutually submitted the demand set forth in the plaint to the arbitration of A B and C D, and which said submission has never been revoked.

2. That on the      day of      18      , at      , the said A B and C D made and published their award, by which they declared the plaintiff not entitled to any part of his said demand.

**Essential Allegations.**—It is not necessary to fully state the terms of the award, but the substance thereof should be set forth sufficiently to show that, if such an award was made, the suit is barred.

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### Form No. 378.

#### CREDIT UNEXPIRED. .

1. That the goods mentioned in the plaint were sold to him upon a credit of      months from the      day of      18      .

2. That such period had not elapsed before the commencement of this suit.

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### Form No. 379.

#### DENIAL OF AGREEMENT ALLEGED.

That he denies that he contracted or agreed with the plaintiff in manner or form as alleged in the plaint, or in any manner or form, or at all.

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\* See the illustrations.

**Form No. 380.**

**ANOTHER FORM.**

That he denies that he ever promised (or warranted or contracted) as alleged in the plaint (or, that he ever made the agreement mentioned in the plaint, or any agreement, at any time or place).

**PART II:  
Defences.**

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Contract.**

**Form No. 381.**

**DENIAL OF CONDITIONAL DELIVERY.**

That he denies that the said note (or conveyance) was executed or delivered by the plaintiff, on the condition and understanding alleged, but avers that it was delivered by him absolutely, and without condition.

**Form No. 382.**

**DENIAL OF FACTS ALLEGED.**

That he denies generally and specifically each and every allegation in the said plaint contained (or, That he denies each and every allegation contained in the paragraph numbered      and      ).

**Form No. 383.**

**DENIAL OF FALSITY.**

That he denies that the representations alleged to have been made by the defendant to the plaintiff were false, but, on the contrary thereof, avers that said representations, and each of them, were and are true.

**Form No. 384.**

**DENIAL OF FRAUD.**

That he denies that he obtained the said instrument from the plaintiff by fraud and misrepresentations, in manner and form as the said plaintiff has in his plaint alleged, or by any fraud or misrepresentation whatever.

**Form No. 385.**

**DENIAL OF KNOWLEDGE SUFFICIENT TO FORM A BELIEF.**

That he has no knowledge, information, or belief, sufficient to enable him to answer any or either of the allegations in said plaint

**PART II.** contained, and therefore he denies each and every of said allegations  
**Defences.** [or, if confined to one allegation, after the word "answer" proceed—the  
**Div. I.** allegation that (set out the allegation), and therefore denies the same].  
**Suits on**  
**Contract,**

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**Form No. 386.**

**DENIAL OF PARTNERSHIP.**

That he denies that the said (naming them) were partners as alleged [or, that the said A B was a partner with the said (naming them) as assigned].

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**Form No. 387.**

**DENIAL OF PERFORMANCE OF CONDITIONS PRECEDENT.**

That he denies that the plaintiff did perform the conditions precedent of said contract on his part to be performed, or any one of them, or at all, or that he made any deposit or tender, or (state what), as in the contract required.

**Essential Allegations.**—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance; but if the performance of a condition precedent, not contained in a contract, is necessary to create a cause of action, the facts showing such performance must be alleged.

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**Form No. 388.**

**DENIAL OF PLAINTIFF'S READINESS AND WILLINGNESS TO PERFORM.**

That at the time fixed in the said agreement the plaintiff was not ready and willing, nor in a condition, to perform the conditions of the said agreement on his part.

**Order of Performance of Promises.**—When reciprocal promises are to be simultaneously performed, neither party is entitled to claim performance unless he is ready and willing to perform his promise;\* but when the order of performance is fixed by the contract, they must be performed in that order; and if not expressly fixed, they must be performed in the order which the nature of the transaction requires.†

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\* Contract Act, 1872, s. 51.

† Contract Act, 1872, s. 52.

On this subject the law in England has been explained by Lord Mansfield as follows: There are three kinds of covenants: firstly, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and when it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff; secondly, there are covenants which are conditions, and dependent, in which the performance of one depends on the prior performance of the other, and therefore, until this prior condition is performed, the other party is not liable to an action on his covenant; thirdly, there is also a third sort of covenants which are mutual conditions to be performed at the same time, and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is bound to do the first act.\* And it has been held that, where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and, in consideration thereof, B covenants to pay A a sum of money on the same day, neither can maintain an action without averring a performance, or an offer to perform, on his part, though it is not certain which of them is obliged to do the first act: this particularly applies to cases of sale.† But in another English case it was held that, in an action for non-delivery of goods sold, it is sufficient for the plaintiff to aver a request for delivery, and that he was ready and willing to receive the goods, and to pay for them, but that defendant refused to deliver; without averring an actual tender of the price;‡ and this is the view taken by the Bombay High Court; where, on a sale of shares, the plaintiffs were ready and willing to transfer, if the defendants had been ready to pay the price, they were held not bound to take any further step until the purchase-money was paid by defendants.§

PART II.  
Defences.

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Suits on  
Contract.

**Evidence.**—An averment of readiness and willingness will be proved by showing that the plaintiff called on the defendant to accomplish his part of the contract.]

### Form No. 389.

#### DENIAL OF REPRESENTATIONS.

That he denies that he made the representations alleged, or any, or either, of them.

\* Jones v. Barkley, 2 Doug. 684.

† Cutter v. Powell, 2 Smith's L. C. 5th edition, 14.

‡ Rawson v. Johnson, 1 East. 203.

§ Imperial Banking Co. v. Pranjavandas, 2 Bom. H. C. R. 266; Imperial Banking Co. v. Atmaram, 2 Bom. C. H. R. 246.

|| Wilks v. Atkinson, 1 Marsh 412; Levy v. Lord Herbert, 7 Taunt 341; 1 B. and M. 54.



## 316 SUB-DIV. I.—DEFENCES GENERALLY APPLICABLE

### PART II. Defences.

#### Form No. 390.

##### DENIAL OF MEMBERSHIP OF COMPANY.

#### DIV. I. Suits on Contract.

That he never subscribed for any share or shares in the company mentioned in the plaint, and never became a shareholder in, or holder or owner of any share or shares of, the said company, in his own right, or in trust for others.

#### Form No. 391.

##### THE SAME—SHARES SOLD.

That on or about the      day of      18      , he sold and transferred all his shares and interest in the said company; and that he had not then, nor has he had since that time, nor has he now, any property or interest of any nature or kind whatsoever in the said company, as shareholder, or otherwise.

#### Form No. 392.

##### DENIAL OF TRUST.

1. That he denies that he received the said      , in the plaint mentioned, for the purposes or on the trusts alleged, or any of them, or in trust at all, in manner alleged in said plaint, or in any manner.

2. That he avers that he received the same as and for his own property, absolutely, and without any trust thereto attached.

#### Form-No. 393.

##### DURESS.

1. That the (bond) mentioned in the plaint was extorted from him by threats of personal violence, and was executed by him under fear of the same (state force, &c.).

2. That the said (bond) was executed by him without any consideration therefor.

**Coercion Defined.**—Coercion is what in English law is called duress; it is defined in the Contract Act as follows: "Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

The act must be unlawful, and where imprisonment is charged it must be shown that the imprisonment was illegal; so, where a person, while under arrest in execution of a decree which had been made against him by a Court having no jurisdiction to make it, gave the holder of the decree a bond for the amount of such decree in order that he might be released from such arrest, it was held that such bond was given under duress.\* But imprisonment in a country where there is no settled system of law or procedure, and where the judge is invested with arbitrary powers, is duress, which will avoid a contract made under such circumstances;† and therefore, where the agent of plaintiff, who, at the instigation of defendant, had been imprisoned by the Siamese authorities on a charge of stealing timber, and, in order to obtain his release, contracted to purchase, from the defendant, for the plaintiff, the timber which he was charged with stealing, at a price much beyond its value, it was held that the plaintiff might repudiate the contract as obtained under duress.‡

PART II.  
Defences.  
DIV. I.  
Suits on  
Contract.

In the case of violence or threats, the age, sex, state of health, &c., must be taken into consideration; and they are grounds of avoiding the contract not only when they are exercised on the contracting party in person, but when the wife, husband, parents, or children, or any persons whatever, are the object of them;§ in which respect the law in this country differs from that in England.||

### Form No. 394.

#### FRAUD.

1. That the plaintiff induced him to make the note mentioned in the plaint by representing that he was authorized by one A B, to whom the defendant owed the amount of the same, to take a note to himself in satisfaction of such debt (or otherwise state the fraudulent misrepresentation).

2. That the said representations were false.

3. That the defendant received no consideration for the said note.

**Onus Probandi.**—Where the defendant does not specifically allege fraud otherwise than when, generally denying the truth of the plaintiff's allegations, he states the plaintiff's case to be not true, the *onus probandi* is on plaintiff.¶

**Where Defendant is Particeps Criminis.**—No one ought to be allowed to take advantage of his own fraud; but a defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit.\*\*

\* *Banda Ali v. Banspat Singh*, 1 L. R., 4 All. 351.

† *Moung Shway Att v. Ko Byaw*, 1 L. R., 1 Cal. 330; L. R., 3 L. A. 61.

‡ *Moung Shway Att v. Ko Byaw*, *supra*.

§ Contract Act, 1872, s. 15.

|| *Smith v. Monteith*, 13 M. and W. 437.

¶ *Lala Arbunt v. Mothoora Lall*, 6 W. R. 195.

\*\* *Seahaiya v. K. Kandaiya*, 3 Mad. H. C. R. 249.

PART II.  
Defences.

## Form. No. 395.

## INFANCY OF DEFENDANT.

DIV. I.  
Suits on  
Contract.

That at the time of making the supposed agreement (or of the delivery of the goods) mentioned in the plaint, he was under the age of eighteen years, to wit, of the age of      years, and said agreement did not relate to things necessary for his support.

**Infancy how Determined.**—The question of disability to make a contract on account of infancy is decided by the *lex loci contractus*,\* and in India the question of minority is determined by the law of the country of domicile of the person concerned, unless it be regulated by special or local laws.

**Period of Minority.**—For all persons domiciled in British India the period of minority is eighteen years,† except persons under charge of the Court of Wards, or who have guardians appointed by a Court, whether merely *ad litem* or otherwise, in which case the period is twenty-one years.‡

**Ratification.**—Agreement made by minors are, under the Contract Act, absolutely void, and therefore incapable of ratification, except in the case of a minor partner, who will be liable, unless, on attaining majority, he expressly repudiates the partnership.§

## Form No. 396.

## INSOLVENCY.

1. That on the      day of      18      , in the Court of      he was adjudged insolvent, and entitled to his discharge from all debts mentioned in his schedule.

2. That the sum of Rs.      now claimed by the plaintiff was one of the debts entered in said schedule.

## Form No. 397.

## THE SAME—BY COMPOSITING DEED.

1. That he admits that on the      day of      18      , he was indebted to the plaintiffs, as alleged in the plaint.

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\* *Male v. Roberts*, 3 Esp. 163.

† Act IX. of 1875.

‡ Act IX. of 1875, s. 2; *Suttia Ghosal v. Suttayanund Ghosal*, I. L. R., 1 Cal. 388; *Khivahish v. S. Prasad Singh*, I. L. R., 3 All. 598; *Periasami v. Seshadri*, I. L. R., 3 Mad. 11.

§ Contract Act, 1872, s. 243.

2. That afterwards, on the       day of       18       , at       , PART II.  
the plaintiffs, by an instrument in writing under their hands, agreed Defences.  
with the defendant that they would accept Ra.       , then and Div. I.  
there paid them by the defendant, and by the plaintiffs then and there Suits on  
accepted and received, in full satisfaction of said indebtedness; and Contract.  
divers other creditors of the defendant then and there also, by the same  
instrument, agreed to accept, and did accept, the sum currently with  
the said plaintiffs, in full satisfaction of the several debts of defendant  
to such creditors respectively, and covenanted with the defendant not  
to sue him for such respective debts; a copy of which deed is hereunto  
annexed as a part hereof.

**Foreign Certificates of Bankruptcy.**—A foreign certificate of bankruptcy is no answer to a demand in the Courts of this country,\* unless it is the certificate of a Court of the country in which the debt or liability arose.† But an English certificate is good in all English Courts.‡ but the reverse does not hold good, so that the certificate of a Colonial Court will be no answer in an action in England.§

## Form No. 398.

### MATERIAL ALTERATION.

That after the execution of the said instrument, and before this suit, the same was, without the consent of the defendant, materially altered (state how).

**Effect of Alteration.**—An immaterial alteration in a written contract, even by a party to the instrument, does not invalidate it;|| but a material alteration, if fraudulent or unauthorized, renders it wholly invalid. The law on the subject has been stated thus: "The rule of law applicable to this subject is that a material alteration of a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be effected by it, and perhaps also with this additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it.¶

\* *Armani v. Castrique*, per Pollock, C.B., 13 M. and W. 448.

† *Ellis v. M'Henry*, per Bovill, C.J., L. R., 6 C. P. 288.

‡ *Armani v. Castrique*, *supra*; *Edwards v. Ronald*, 1 Knapp. P. C. 259.

§ *Bartlett v. Hodges*, 8 Jur., N. S., 52.

|| *Aldan v. Cornwell*, L. R., 3 Q. B. 572.

¶ *Tayl., S.*, 1617; *Gogan Chunder v. Dhurondher*, I. L. R., 7 Cal. 616.

## 320 SUB-DIV. I.—DEFENCES GENERALLY APPLICABLE.

### PART II. Defences.

#### DIV. I. Suits on Contract.

**Presumptions.**—The following are the presumptions of English law as to alterations in written contracts :—

1. Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.
2. There is no presumption as to the time when alterations and interlineations appearing on the face of writings not under seal were made, except that it is presumed that they were so made that the making would not constitute an offence.\*

**Onus Probandi.**—Though the onus of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it, yet the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed, and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified, and tampered with, after execution by the party claiming under it.†

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### Form No. 399.

#### PAYMENT.

That on the       day of       18       , at       , he paid to the plaintiff the money claimed in the plaint (or, Ra.       , on account of the claim in the plaint).

**Effect of Plea of Payment.**—The plea of payment, being an affirmative plea, casts the burden of proof on the defendant.‡

**Presumption of Payment.**—Where the defendant pleads payment of a bond, and produces the bond, the Court will, under section 114 of the Evidence Act, 1872, presume that the obligation has been discharged.§

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### Form No. 400.

#### PAYMENT BY NOTE.

That on the       day of       18       , at       , at the request of the plaintiff, he made his promissory note to one C D for Ra.       , in discharge of the indebtedness stated in the plaint.

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\* Stephen's Art. 189.

† *Mussumut Khooboo v. Baboo Moodnarain*, 9 Moore's I. A. 1.

‡ See s. 101, Contract Act, 1872.

§ *Baboo Mohinee Mohun v. Baboo Sreenath Dass*, 22 W. R. 265.

Form No. 401.

PART II.  
Defences.

PAYMENT BY BILL OF EXCHANGE.

Div. I.  
Suits on  
Contract.

That before this suit the plaintiff drew his bill on the defendant for the amount of said account (or other indebtedness alleged), dated on the      day of      18      , and payable to the order of the plaintiff,      months after said date; which the defendant then accepted, and plaintiff received said acceptance on account of said indebtedness.

Form No. 402

RELEASE.

That on the      day of      18      , at      , by an instrument in writing, of the same date, the plaintiff released the defendant from the claim set up in the plaint.

**Effect of Release.**—By section 63 of the Contract Act a promisee may dispense with, or remit, wholly or in part, the performance of the promise made to him, and as to the party released, the cause of action is discharged; \* but a release of one joint promisor does not discharge the other, nor does it free the joint promisor so released from responsibility to the other joint promisors.†

**Construction of Instrument of Release.**—General words used in a release must be confined to matters of the same nature, and forming part of the transaction which the parties had in view.‡

Form No. 403.

TENDER.

1. That on the      day of      18      , at      , before the commencement of this suit, he tendered to plaintiff Rs.      , in payment of the (contract, note, or indebtedness) in the plaint set forth.

2. That the defendant has always been, and still is, ready and willing to pay the same to the plaintiff, and now pays the same into Court.

\* See *iii. a.*

† Contract Act, 1872, s. 44.

‡ *Leelanund Singh v. Hamidooddin*, 1 L. R., 8 Cal. 576; and see *Directors of L. and S.-W. Ry. Co. v. Blackmore*, L. R., 4 H. L. 610.

**PART II. Defences.** Tender how Made.—Tender or offer to perform, in order to be effectual, must fulfil the following conditions :—

Div. I.  
Suite on  
Contract.

1. It must be unconditional : and as to this it has been held that an offer to pay on getting a receipt is not unconditional,\* nor when the tender is coupled with the condition that the creditor shall admit that no more is due ; † but tender “under protest” is valid, because the protest does not impose any condition on the acceptance, but merely obviates the effect of payment as an admission.
2. It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing then and there to do the whole of what he is bound by his promise to do. As to what is a proper time and place, see sections 46 to 50 of the Contract Act. With regard to the last part of this sub-section the rule in England is, that to constitute a valid tender of payment in money, the same must be actually produced, unless dispensed with. ‡
3. If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver ; therefore the offer of goods enclosed in a cask, which the other party is not allowed to open, is not a good offer of performance. §

**Tender when Excused.**—If the promisee gives the promisor to understand that it is useless to tender anything less than what he wrongfully demands, the promisor is excused from making a tender. ||

**Essential Allegations.**—The rule in England is that the defendant should state that he has always been, and still is, ready to pay the sum tendered, and should pay the amount into Court ; but this does not appear necessary under section 38 of the Contract Act, except that, in order to entitle the defendant to costs, he should pay the amount into Court. ¶

**Legal Tender.**—No gold coin is legal tender ; \*\* rupees and half rupees are legal tender provided they have not lost more than two per cent. in weight, or have not been defaced or diminished otherwise than by use ; quarter rupees, the eighth of a rupee, and copper coin, are legal tender only for fractions of a rupee. Currency-notes are legal tender for any sum of five rupees and upwards, but only within the circle of issue. ††

\* *Laing v. Menden*, 1 Q. and P. 257.

† *Evans v. Judkin*, 4 Camp. 156.

‡ See *Finch v. Brook*, 1 Bing. N. O. at p. 257 ; *Isherwood v. Whitmore*, 11 M. & W. 347.

§ *Isherwood v. Whitmore*, *supra*.

|| *The Norway*, Brow & Lush. 410.

¶ *Bolye Chand v. Manland*, 1 L. R., 4 Cal. 572.

\*\* Act XXIII. of 1870, s. 12.

†† Act XXIII. of 1870, s. 16.

Form No. 404.

ULTRA VIRES CORPORATION.

PART II.  
Defences.

DIV. I.  
Suits on  
Contract.

1. That the plaintiffs were and are not authorized by law to take, hold, and convey immoveable property, except for the following purposes, and in the following manner (here set forth the power of the Company).

2. That the instrument mentioned in the plaint was executed and accepted on the part of said Company for the purpose of (here state purpose not within the power).

Form No. 405.

WANT OF CONSIDERATION.

That he received no consideration for the (promissory note) mentioned in the plaint (mistake, or any facts showing fraud, should be alleged).

Form No. 406.

THE SAME—THAT THE DEBT WAS FOR MONEY LOST AT PLAY.

1. That the plaintiff and the defendant played together at a game of chance called , for stakes, upon credit, and not for ready money; and at said games the plaintiff won Rs. of the defendant, which he did not pay.

2. That thereafter the defendant gave the plaintiff the note mentioned in the plaint for said money so staked and lost.

Form No. 407.

THE SAME—THAT NOTE WAS GIVEN TO COMPOUND OFFENCE.

1. That heretofore, on the day of 18, one A B, the son of defendant, had misappropriated Rs. , the property of the plaintiff.

2. That the defendant, in order to compound and settle the said offence, gave the said note; in consideration of which the plaintiff and others desisted from informing and prosecuting upon said offence.

3. That there was no other consideration for said note.

Consideration—Difference between English and Indian Law.—The definition of consideration in the Contract Act, 1872, differs from that under the



**PART II.** English law. There the consideration must proceed from the plaintiff, or, if it proceed immediately from a third party, it must be on the procurement of the plaintiff; but here the consideration may proceed from any other person than the promisee, if the thing done, or abstained from, is done, or abstained from, *at the desire* of the promisor, and whether by his procurement or not.\*

**DIV. I.**  
Suits on  
Contract.

Again, the consideration may be a past one; whereas in England a past consideration will not support a subsequent promise, at least not without great limitations.

The rule of English law, that a contract under seal imports a consideration, is not law in this country,† and the Court will in all cases require proof of consideration; but the inadequacy of the consideration is not in itself sufficient to render a contract void.‡

**Unlawful Consideration.**—Where the consideration of the agreement is unlawful, the agreement is void;§ and the Court would have the right, perhaps even lie under an obligation, to take cognizance, *motu proprio*, of any objection, manifestly apparent on the face of the proceedings which showed that it was against morality or public policy.||

**Negotiable Instruments—Presumption of Consideration.**—Until the contrary is shown, it is presumed that a negotiable instrument was accepted, indorsed, negotiated, or transferred for consideration.¶

### Form No. 408.

#### WANT OF WRITTEN AGREEMENT.

That the plaintiff's suit should be dismissed, because neither the defendant nor any person by him legally authorized, ever made, or signed, any instrument in writing, conveying (or mortgaging, or leasing) said premises to the plaintiff, as he has in said plaint alleged.

**When Writing Necessary.**—By section 5 of the Indian Trusts' Act, 1882, a trust must be declared in writing, signed by the author of the trust, or by the trustee, and registered; and by sections 7 to 9 of the Statute of Frauds, the declaration or creation, and the grant or assignment, of an express trust of lands, tenements, and hereditaments, must be in writing, signed by the party declaring, creating, granting, or assigning such trust.

Where the Transfer of Property Act, 1882, applies, sales and mortgages of immoveable property of the value of Rs. 100 or upwards must be in writing, registered; and also leases from year to year, or for any term exceeding one year, or reserving a yearly rent.

\* But see *Chinnaya Ram v. Ramaya*, 1 L. R., 4 Mad. 137.

† *Raja Sahib Prahlad Sen v. Budhu Sing*, 2 B. L. R., P. O., 111.

‡ Contract Act, 1872, s. 25.

§ Contract Act, 1872, s. 23.

|| *Fischer v. Kamala Naicker*, 8 Moore's I. A. 137.

¶ Negotiable Instruments Act, 1881, s. 118.

## SECOND SUB-DIVISION.

### SUITS FOR DEBT.

PART II.  
Defences.

DIV. I.  
Suits on  
Contract.

### CHAPTER I.

#### ACCOUNTS.

#### Form No. 409.

#### ACCOUNT STATED.

Defendant states :—

1. That after the said dealings in the plaint named, and before the commencement of this suit, to wit, on the       day of       18       , the plaintiff and defendant came to a mutual accounting touching the several matters and things in said plaint mentioned.

2. That on the said account there was found due from the plaintiff to defendant Rs.       , as a final balance upon said mutual dealing and matters between them.

3. That defendant avers that the said stated account is just and true.

**Defence of Account Stated.**—An account stated is not conclusive, and may be opened for fraud or mistake,\* or that the debt is bad for want of consideration.† or that the consideration was illegal.‡

**Defence of Limitation.**—It is no defence to a suit on an account stated that some of the items were barred by limitation.

### CHAPTER II.

#### AWARDS.

#### Form No. 410.

#### INVALIDITY OF AWARD.

Defendant states :—

That by the terms of the agreement referred to in the plaint, the arbitrators were to hear the evidence and arguments of both parties at meetings called upon notice to both ; but they refused to hear the evidence offered by defendant, and failed and refused to give defendant notice of the said meetings, or any of them.

\* *Thomas v. Hawkes*, 8 M. & G. 140; *Perry v. Attwood*, 25 L. J., Q. B., 408.

† *French v. French*, 2 M. & G. 644; *Jacobs v. Fisher*, 1 C. B. 178.

‡ *Rose v. Savory*, 2 Bing. N. C. 145.

**PART II.**      **Award how to be Made.**—The making of an award is a judicial act, and must be done by the arbitrators in the presence of one another, and at the same time ;<sup>o</sup> but the mere omission to sign the award at the same time, and in each other's presence, will not invalidate it.†  
**Defences.**  
**Div. I.**  
**Suits on**  
**Contract.**

**Powers of Arbitrators.**—After an award has been made and handed to the parties, the functions of the arbitrators cease ; and they have no power afterwards to deal with an application for review of their decision.‡

**Requisites of an Award.**—An award must be a final decision on all the matters requiring determination ; it must neither fall short, nor go beyond, the matters which the parties intended to submit ; it must be definite and certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature or extent of the duties imposed by it upon the parties ; it must be possible, consistent, and intelligible ; there must be no illegality apparent on the face of it ; and by illegality it is not meant that there is a direction to do an illegal act, for that of course is void, but that the decision is contrary to law, or, in other words, the arbitrator has made a mistake of law which is apparent upon the face of the award.§

**Corruption and Misconduct of Arbitrator.**—An award will be set aside if it be proved that the arbitrator is corrupt or partial, or that he is secretly interested in the subject referred ; and there may be ample misconduct in a legal sense to make the Court set aside an award, even where there is no ground for imputing the slightest improper motives to the arbitrator.||

**Fraud.**—An award will be set aside if either party be guilty of fraudulent concealment of matters which he ought to have disclosed, or if he wilfully mislead or deceive the arbitrator.¶

**Time.**—If the submission limits no time within which the arbitrator is to make his award, his authority to make it will continue for his life, unless it be revoked ; but where the submission fixes a limit of time, the award must be made within it, unless further time be subsequently given.\*\*

**Appointment of Umpire.**—Arbitrators have no power to appoint an umpire unless authorised to do so by the submission.††

**Duty of Umpire.**—An umpire must re-hear the case as if he were commencing a new case as arbitrator.‡‡

\* *Maharajah Sir Joy Mungal Singh v. Mohun Ram Tewares*, 12 W. R. 397 ; 23 W. R. 429.

† *Bhabusundari Dasi v. Makhunlall Dey*, 8 B. L. R. 128.

‡ *Dutto Singh v. Dasad Bahadur Singh*, 1. L. R., 9 Cal. 575.

§ See *Russell on Arbitration*, Chapter V.

|| *Russell on Arbitration*, 627.

¶ *Russell on Arbitration*, 635.

\*\* *Russell on Arbitration*, 181, 182.

†† *Russell on Arbitration*, 214.

‡‡ *Russell on Arbitration*, 230.

Form No. 411.

DENIAL OF AWARD.

PART II.  
Defences.

DIV. I.  
Suits on  
Contract.

Defendant states :—

That the said arbitrators (or umpire) did not make and publish any award (or the award alleged in the plaint).

Form No. 412.

DENIAL OF VERBAL SUBMISSION.

Defendant states :—

That he did not agree or promise, as alleged.

Form No. 413.

DENIAL OF PERFORMANCE BY PLAINTIFF.

Defendant states :—

That the plaintiff did not perform the award on his part, but on the contrary omitted to (set forth his omission).

Form No. 414.

PERFORMANCE BY DEFENDANT.

Defendant states :—

That he duly performed the award on his part, and upon the day of 18 (state what was done).

CHAPTER III.

EXPRESS PROMISES.

Form No. 415.

DENIAL OF PROMISE.

Defendant states :—

That he did not promise or agree as alleged in the plaint, and that he did not make any agreement in respect to the matters stated in the plaint.

PART II.  
Defences.DIV. I.  
Suits on  
Contract.CHAPTER IV.  
GOODS SOLD AND DELIVERED.

## Form No. 416.

## DENIAL OF PLAINTIFF'S TITLE.

Defendant states :—

That no part of the goods in the plaint mentioned was the property of plaintiff when sold to defendant ; but the same then was the property of one A B, who alone, and not the plaintiff, sold the same to this defendant.

## Form No. 417.

## ARTICLES FURNISHED DEFENDANT'S WIFE NOT NECESSARIES.

Defendant states :—

1. That the articles mentioned in the plaint were not furnished to his said wife with his consent.

2. That the same were not necessary to his said wife.

CHAPTER V.  
FOREIGN JUDGMENTS.

## Form No. 418.

## INVALIDITY OF A FOREIGN JUDGMENT.

Defendant states :—

1. That no summons, or copy of plaint, was served upon him in the suit mentioned in the plaint.

2. That he never appeared, in person or by attorney, in the said suit.

**Defences to Suit on Foreign Judgment.**—The defendant is not at liberty in a suit on a foreign judgment to plead any matter which could have been set up as a defence on the merits in the original suit ;<sup>a</sup> neither will a defendant be permitted to defend on the ground that the foreign judgment was erroneous in point of law and on the merits, or that fresh evidence has been discovered since the

<sup>a</sup> *Henderson v. Henderson*, 6 Q. B. 288 ; *DeCasse Bressac v. Rathbone*, 30 L. J. Ex. 238 ; *Munroe v. Pilkington*, 31 L. J., Q. B., 81, 89 ; *Castrique v. Imrie*, L. C., 4 H. L. 414 ; 29 L. J., C. P., 321 ; 8 C. B. N. S. I. 405.

judgment, showing it to be erroneous, or for a mistake in the law of the foreign State in which the judgment was given ;\* or that evidence was admitted which would not be admissible by English law ;† nor is it a sufficient ground for impugning the judgment of a foreign Court, which ordinarily proceeds in accordance with the recognised principles of judicial investigation, to show that in the particular instance its procedure was irregular,‡ and where limitation merely bars the remedy, and does not destroy the right, the judgment of a foreign Court is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country in which the contract was made.§

PART II.  
Defences.DIV. I.  
Suits on  
Contract.

A foreign judgment may, however, be impeached on any of the following grounds :

- (1) that the Court had no jurisdiction in respect of the matter of the suit, or of the parties ;||
- (2) for errors on the face of the judgment, and for this purpose the reasons assigned in the judgment form part of it ;¶
- (3) that the foreign Court repudiated English law when it was necessary to decide the case ;\*\*
- (4) that the judgment was contrary to natural justice ;††
- (5) that the judgment was not final and conclusive ;‡‡
- (6) that the defendant was not summoned, and had no notice of the proceedings ;§§
- (7) that the judgment was obtained by fraud ;||| even when the question of fraud has been investigated by the foreign Court, and it was then decided not to exist ;¶¶
- (8) that the judgment is admitted to have been erroneous.\*\*\*

\* *Munroe v. Pilkington*, 31 L. J., Q. B., 86, 89.

† *DeCaese Bressae v. Rathbone*, 30 L. J. Ex. 238.

‡ *Nallatambi Mudaliar v. Ponnusami Pillai*, 1 L. R., 2 Mad. 400, at p. 406.

§ *Nallatambi Mudaliar v. Ponnusami Pillai*, *supra*.

|| *Sreehuree Bukshoe v. Gopal Chunder Samunt*, 15 W. R. 500; *Boloram Gooy v. Kameenee Dossee*, 4 W. R. 108; *Mathappa Chetti v. Chialappa Chetti*, 1 L. R., 1 Mad. 196; *Ferguson v. Mahon*, 11 A. & E. 179.

¶ *Rennes v. Drue*, 26 L. J. Ch. 196.

\*\* *Simson v. Fogo*, 29 L. J. C. 657; *Munroe v. Pilkington*, 31 L. J., Q. B., 81. See on this subject *Cammell v. Sewell*, 26 L. J. Ex. 350; *Castrigue v. Imrie*, 30 L. J., C. P., 177; *Wolf v. Oxholm*, 6 M. & S. 98; *Godard v. Gray*, L. R., 6 Q. B. 139.

†† *Buchanan v. Rucker*, 1 Camp. 63.

‡‡ *Sreehuree Bukshoe v. Gopal Chunder*, *supra*; *Patrick v. Sheddon*, 2 E. & B. 14; *Frayes v. Worms*, 10 C. B. N. S. 149; *Plummer v. Woodbourne*, 4 B. & C. 625.

§§ *Buchanan v. Rucker*, *supra*; *Reynolds v. Fenton*, 3 C. B. 187.

||| *Sreehuree Bukshoe v. Gopal Chunder*, *supra*; *Boloram Gooy v. Kameenee Dossee*, *supra*; *Ochsenbein v. Papeller*, L. R. 8 Ch. 695.

¶¶ *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295.

\*\*\* On this subject see further *Smith's L. C.* 7th ed. 823—825; *Story's Conflict of Laws*, 7th ed. 732.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

## CHAPTER VI.

### GUARANTEES.

#### Form No. 419.

##### DENIAL OF GUARANTEE.

Defendant states :—

That he did not make the guarantee set forth in the plaint.

Revocation.—A continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor.

#### Form No. 420.

##### DENIAL OF PLAINTIFF'S PERFORMANCE.

Defendant states :—

That the plaintiff did not supply the goods to the said A B, as alleged in the plaint, or any part thereof.

#### Form No. 421.

##### ALTERATION OF CONTRACT RELEASING GUARANTOR.

Defendant states :—

1. That on the      day of      , 18      , at      , the plaintiff agreed with C D in the plaint mentioned, in consideration of Rs.      , to extend the time of payment of the rent guaranteed by the defendant      days.

2. That the defendant had no knowledge of the said extension, and did not then, nor has he since, assented thereto.

Variance of Contract—Discharge of Surety.—Any variance, without the surety's consent, in the terms of the contract between the principal debtor and creditor, discharges the surety as to transactions subsequent to the variance.

A composition with, or promise to give time to, or not to sue, the principal debtor, discharges the surety, unless done with his consent ; but mere forbearance to sue does not discharge the surety.\*

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\* Contract Act, 1872, ss. 133, 135, 137.

Consent of a surety to a variance in the contract cannot be implied from the mere fact of his knowledge of it, and his silence;\* but it may be inferred from the circumstances.†

**PART II.**  
**Defences.**

Where a bond was taken by a creditor from a principal debtor without the knowledge or consent of the sureties (fixing certain periods for the payment of the sums named in the bond), the sureties were held entitled to be discharged from liability.‡

**Div. I.**  
**Suits on**  
**Contract.**

The acceptance of interest in advance by a creditor, as a general rule, operates as a giving time to the principal debtor, and consequently as a discharge to the surety, unless he knows of or consents to it.§

**Effect of Release of Principal Debtor.**—A release of the principal debtor discharges the surety.||

**Accommodation Bill—Discharge of Acceptor.**—Where the holder of a hundi gives time to the drawer without the consent of the accommodation acceptor, the latter is discharged.¶

### Form No. 422.

#### DEPARTURE FROM GUARANTEE.

**Defendant states :—**

That he did not agree to be answerable generally to the plaintiff for the value of goods sold to A B, but only for goods to an amount not exceeding Rs. , which limit the plaintiff exceeded in his alleged sale.

**Departure from Contract—Discharge of Surety.**—Where plaintiff advanced money to a limited Company on the guarantee of two of the directors, and it was agreed that plaintiff should pay himself out of the first money received on behalf of the Company, and the plaintiff, although he received money, did not pay himself, it was held that the guarantor was discharged.\*\*

**Other Defences.**—Other defences are : (1) death of the guarantor ; the law seems to be very unsettled in England as to how far a guarantee is determined by the death of the guarantor ; (2) concealment of the material particulars at the time the contract was made ; (3) alteration of the position of the parties ; (4) the parting with or loss of securities, or neglecting to take advantage of securities, by the creditor against the principal debtor.

\* *Polak v. Everett*, 1 Q. B. D. at p. 673.

† *Leathley v. Spyer*, 5 L. R., C. P., 595.

‡ *Puree Soondaree Dabee v. Chunder Shekhar Ghosal*, 15 W. R. 252.

§ *Protap Chunder Dass v. Gour Chunder Roy*, I. L. R., 4 Cal. 132 ; *Kally Prosunno Roy v. Umbica Churn Bose*, 18 W. R. 417.

|| *Contract Act*, 1872, s. 134.

¶ *Gourchandra Rai v. Protapchandra Dass*, I. L. R., 6 Cal. 241.

\*\* *Nicholls v. Wilson*, I. L. R., 4 Cal. 560.



PART II.  
Defences.Div. I.  
Suits on  
Contract.

## CHAPTER VII.

## INSURANCE.

## Form No. 423.

## DENIAL OF POLICY.

Defendants state :—

That they did not make or deliver the policy of insurance as alleged.

## Form No. 424.

## LIFE INSURANCE—SUICIDE.

Defendants state :—

1. That it was an express condition of the said policy of insurance that the defendant Company should not be liable to pay the said sum of Rs. , or any part thereof, to the executors, administrators, or assigns of the said A B, if he should commit suicide, or die by his own hand.

2. That the said A B did commit suicide, and died by his own hand.

**Effect of Clause against Suicide.**—Where the policy contained a clause avoiding it if the person insured “commits suicide or dies by his own hand,” and the insured committed suicide in a fit of insanity, his representatives, or those who hold the policy, cannot recover on it.\*

## Form No. 425.

## FALSE DECLARATION.

Defendants state :—

1. That it was a term of the said contract of assurance that the said C D should truthfully answer certain questions then submitted to him in writing by the defendants, and that, if the said answers were in any particular inaccurate, the said policy should be deemed to be void.

2. That the said C D did not truthfully answer all the said questions; but, on the contrary, falsely stated (copy the declaration), whereas, in fact (negative the same).

**Mis-statement need not be Material.**—It is no matter, though the mis-statement be immaterial; for, as the basis of the contract is the truth of the representation, its materiality is not in question.†

\* *Cleft v. Schwabe*, 3 C. B. 437; *Dormay v. Borrodale*, 5 C. B. 390.

† *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Cazenove v. British Equitable Assurance Co.*, 6 C. B., N. S., 437; L. J., 28 C. P. 259.

Form No. 426,

FIRE INSURANCE—DENIAL OF PLAINTIFF'S INTEREST.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

Defendants state :—

1. That the plaintiff did not own, and had no insurable interest in, the said goods (or building) at the time of the happening of said loss.

Form No. 427.

DENIAL OF LOSS.

Defendants state :—

That the said building was not destroyed (or injured) during the term of said insurance by (state peril), but the said loss occurred wholly by (indicate excepted peril).

Form No. 428.

MARINE INSURANCE—POLICY OBTAINED BY MISREPRESENTATION.

Defendants state :—

That they were induced to subscribe the policy and become insurers, as alleged in the plaint, by the misrepresentation made by the plaintiff to the defendants of a fact then material to be known to the defendants, and material to the risk of the said policy ; that is to say (state misrepresentation).

**Effect of Misrepresentation.**—A material misrepresentation will vitiate the policy, though the actual loss is in no way connected with the misrepresentation,\* and any misrepresentation made to the first of the underwriters is regarded as made to them all.†

If goods insured are overvalued with intent to defraud the underwriters, the contract is void, and the insured cannot recover even for the value actually on board.‡

**Effect of Concealment of Material Fact.**—The concealment of a material fact which relates to the risk insured renders the policy void.§

\* *Seaman v. Foneran*, 2 Str. 1183.

† *Marsden v. Reed*, 3 East 372; *Bell v. Carstairs*, 2 Camp. 543.

‡ *Haigh v. De la Cour*, 3 Camp. 319.

§ *Carter v. Boehm*, 3 Barr. 1905; *Russell v. Thornton*, 6 H. and N. 140.

PART II.  
Defences.

## Form No. 429.

## TRANSFER WITHOUT INSURER'S CONSENT.

DIV. I.  
Suits on  
Contract.

Defendants state :—

1. That it is among other things provided by said insurance-policy, that in case of any transfer or termination of the interest of the insured, either by sale or otherwise, of the property insured, without the consent of the Company, the policy should from thenceforth be void.

2. That after the making of said policy, and before the loss alleged, the interest of the said (insured) in said (things insured) was terminated and transferred, and the title thereto vested in plaintiff without the consent of the defendants, whereby the policy became and was void at the time of said loss.

## Form No. 430.

## UNSEAWORTHINESS OF VESSEL.

Defendants state :—

1. (Allege provisions of policy, unless it appears by the plaint.)

2. That at \_\_\_\_\_, and in the course of said voyage, and in reference to said voyage, and to any damage which the said ship sustained in the prosecution thereof, a regular survey was had on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten (or state particulars showing a ground of condemnation wholly within the provisions of the policy).

**Implied Warranties.**—Besides those mentioned in the policy, there are other warranties which are implied in all policies of marine insurance. Of these the principal are : first, that there shall be no deviation from the voyage insured, and second, that in case of a *voyage* policy the ship is seaworthy at the commencement of the risk ; as to the first, any deviation is fatal, although no loss is thereby caused ; but all deviations by reason of inevitable accident or stress of weather to obtain needful provisions, or to do needful repairs, or avoid capture, are implied exceptions.\* As regards seaworthiness, this means that the ship is in a fit state as to repairs, equipment, crew, and all other matters, to encounter ordinary perils, and not only does the shipowner warrant that his ship is seaworthy, but the insurer of goods warrants the ship seaworthy ;† but there is no implied warranty that the goods themselves are seaworthy,‡ nor in the case of *time* policies.§

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\* Urquhart v. Barnard, 1 Taunt. 456.

† Biocard v. Shepperd, 14 M. P. C. 494.

‡ Koebel v. Saunders, 17 C. B., N. S., 71 ; L. J., 33 C. P. 310.

§ Dudgeon v. Pembroke, 2 App. 284 ; 46 L. J., H. L., 409.

CHAPTER VIII.

MONEY COUNTS.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

Form No. 431.

DENIAL OF RECEIPT.

Defendant states :—

That he has not received the money mentioned in the said *plaint*, nor any part thereof.

Form No. 432.

ACCOUNTING AND PAYMENT.

Defendant states :—

That on the      day of      18      , at      , he accounted with, and paid over to, the plaintiff all moneys received by him up to that day, as such agent of the plaintiff.

Form No. 433.

DENIAL OF LOAN.

Defendant states :—

That the plaintiff did not lend him the money mentioned in the *plaint*, nor any part thereof.

Form No. 434.

MONEY PAID—DENIAL OF REQUEST.

Defendant states :—

1. That he never requested the plaintiff to pay any money to A B.
2. That he never promised to pay any money to the plaintiff, on account of any money paid to the said A B, or at all.

PART II.  
Defences.DIV. I.  
Suits on  
Contract.CHAPTER IX.  
SERVICES, WORK, AND LABOUR.

## Form No. 435.

## ACCOUNTING AND PAYMENT.

Defendant states:—

1. That he denies each and every allegation in the **plaint**, except what is hereinafter admitted.

2. That he admits that the plaintiff did, at the request of the defendant, enter into the service of the defendant as stated in the **plaint**, but alleges that he accounted with the plaintiff on the      day of  
18      , at      , and that on said accounting there was found due the plaintiff only the sum of Rs.      .

3. That after said accounting, to wit, on the      day of  
18      , he paid to the plaintiff the said sum of Rs.      , as found due upon said accounting, and the plaintiff received and accepted the same in full satisfaction of his said claim.

CHAPTER X.  
USE AND OCCUPATION.

## Form No. 436.

## DENIAL OF USE AND OCCUPATION.

Defendant states:—

That he did not occupy the premises as alleged, or at all.

**Payment of Rent—Estoppel.**—A tenant cannot deny that his landlord had a title to the premises at the ~~beginning of the~~ <sup>beginning of the</sup> tenancy,\* but he may show that the landlord's title has expired or been defeated since the commencement of the tenancy.† Mere payment of rent does not act as an estoppel, and evidence is always admissible to explain the payment and to show on whose behalf it was received;‡ but, if unexplained, the payment of rent would create an estoppel.

\* Evidence Act, 1872, s. 116.

† Taylor, s. 89.

‡ Doe d. Harvey v. Francis, 2 M. Rob. 57.

**Non-payment of Rent.**—When the relationship of landlord and tenant has been proved, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased, and the tenant is bound to prove the fact, particularly if he be still in possession of the premises.\*

PART II.  
Defences.  
Div. I.  
Suits on  
Contract.

**Form No. 437.**  
**DENIAL OF HIRING.**

Defendant states :—

That he did not hire the said premises of the plaintiff as alleged, or in any manner, or at all.

**Form No. 438.**  
**ASSIGNMENT TO THIRD PERSON.**

Defendant states :—

That before the rent claimed in the plaint became due, and on or about the day of 18 , the defendant assigned all his interest in said lease to one C D, who then entered into possession, and so continued when said rent became due.

**Form No. 439.**  
**DISPOSSESSION.**

Defendant states :—

That on the day of 18 , the plaintiff ousted and dispossessed him of the premises mentioned in the plaint, and has ever since kept him out of the possession thereof (or state the facts).

**Form No. 440.**  
**SURRENDER.**

Defendant states :—

That on the day of 18. , he surrendered to the plaintiff the premises mentioned in the plaint, and the plaintiff accepted the same.

**Surrender.**—This is a good defence, even without the acceptance of another tenant by the landlord.†

**Expiry of Plaintiff's Title.**—This is a good defence where the defendant has paid his rent to the person claiming as against the plaintiff.‡

\* *Rungo Lall Mandul v. Abdool Guffoor*, I. L. R., 4 Cal. 314.

† *Dodd v. Ackhorn*, 6 M. and G. 672; see also *Phené v. Popplewell*, 31 L. J., C. P., 235.

‡ *Balls v. Westwood*, 2 Camp. 11; *Mountjoy v. Collier*, 22 L. J., Q. B., 124; *Hickman v. Machin*, 28 L. J. Ex. 310.

PART II.  
Defences.

### THIRD SUB-DIVISION.

Div. I.  
Suits on  
Contract.

## SUITS UPON WRITTEN INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

### CHAPTER I.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

### Form No. 441.

#### BILLS OF EXCHANGE—DENIAL OF ACCEPTANCE.

Defendant states :—

That he denies that he accepted the bill mentioned in the plaint.

**Estoppel.**—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn, but not that the drawer had authority to draw such bill or to endorse it.\*

**Cancelment of Acceptance.**—An acceptance may be cancelled until it has been notified to the holder.†

### Form No. 442.

#### ACCEPTANCE UNAUTHORIZED.

Defendant states :—

That the said bill was made without the authority or consent of this defendant, and out of the course of his regular business, and, without consideration to him, accepted in his name by one A B, fraudulently pretending to act under his authority, but who, in fact, had no authority to accept the same.

**Authority of Agents.**—A general authority to conduct business, and to receive and discharge debts, does not confer upon an agent the power of accepting or endorsing bills of exchange, so as to bind the principal; and an authority to draw bills of exchange does not of itself import an authority to endorse ‡

**Companies.**—**Power to Bind Themselves.**—A Company cannot make itself liable on negotiable instruments, unless it be a trading Company, or the terms of its incorporation expressly, or by reasonable construction, confer on it this power.

\* Evidence Act, 1872, s. 117.

† Chalmers on Bills, 32, 33.

‡ Neg. Inst. Act, 1881, s. 27.

**Companies how to Contract.**—By section 72 of the Indian Companies<sup>8</sup> Act, 1882, a negotiable instrument shall be deemed to have been made, drawn, accepted, or endorsed, on behalf of any Company under the Act, if made, drawn, accepted, or endorsed, in the name of the Company by any person acting under the authority of the Company, or if made, drawn, accepted, or endorsed by, or on behalf or on account of, the Company by any person acting under the authority of the Company.

The following English cases are in point, as section 47 of the English Companies Act, 1862, corresponds exactly with section 72 of the Indian Act.

Where a bill addressed "to the Snowdon Copper Mining Company, Limited," was accepted by two of the directors thus: "Accepted—S. Macdonald, R. Charles, Directors of the Snowdon Copper Mining Company, Limited," it was held that this was an acceptance of the Company, and not of the directors personally;<sup>9</sup> but where a bill was addressed to H. Connah, Esq., General Agent of the X Company, and he accepted thus: "Accepted, on behalf of the Company, H. Connah," it was held that he was personally liable as acceptor;<sup>†</sup> and the directors who signed were held personally liable on a note in the following form: "We, the directors of the Isle of Man Slate Company, Limited, promise to pay J D £1,000 for value received. (Signed) R. Marsh, H. Johnson."

Where three of the directors of the New Fleming Spinning and Weaving Company, one of whom was also the secretary, treasurer, and agent of the Company, drew a bill in favour of S in the following form: "Sixty days after the date of this first of exchange (second and third of the same tenor and date, not being paid) pay to the order of S the sum of Rupees two lakhs only; value received; and place to account of G P, R N, A R, Secretary, Treasurer, and Agent, the New Fleming Spinning and Weaving Company, Limited, Directors," it was held that the Company was not liable, and that, in order to make a Company liable on a bill or note, it must appear on the face of such bill or note that it was intended to be drawn, accepted, and made on behalf of the Company, and no evidence, *de hors* the bill or note, was admissible under section 47 of the Indian Companies Act, 1886.<sup>‡</sup>

The proper way to accept for a Company is by procuration.<sup>§</sup>

### Form No. 443.

#### DENIAL OF PRESENTMENT.

Defendant states:—

That the bill mentioned in the plaint was never presented to A B as alleged, or at all.

<sup>8</sup> Okill v. Charles, 34 L. T. 822.

<sup>†</sup> Herald v. Connah, 34 L. T. 885.

<sup>‡</sup> In the matter of the New Fleming Spinning and Weaving Company, I. L. R., 4 Bom. 275; J. D. R., 3 Bom. 439.

<sup>§</sup> Per Bramwell, B., in Herald v. Connah, *supra*.



**PART II. Defences.** **Presentment when Necessary.**—Presentment for acceptance is only necessary in the case of a bill of exchange payable at sight, and a promissory note payable after sight must be presented for sight.\* **Presentment for payment is compulsory in order to charge other parties than the maker, acceptor, or drawee.†**

**DIV. I. Suits on Contract.**

**Presentment by Post.**—When authorized by agreement or usage a presentment through the Post Office by means of a registered letter is sufficient.‡

**Presentment when to be Made.**—A negotiable instrument payable after date or sight must be presented for payment at maturity in order to charge other parties than the maker or acceptor; § and it must be presented within business hours.¶ A negotiable instrument payable on demand must be presented for payment within a reasonable time.¶¶

**Presentment where to be Made.**—When the instrument is made payable at a specified place, it must be presented at that place, in order to charge the maker or drawer, but not in order to charge other parties; but when the instrument is made payable at a specified place, *and not elsewhere*, it is necessary to make presentment at that place in order to charge *any* of the parties; \*\* if no place is specified, the presentment must be made at the place of business or usual residence of the drawee or acceptor, and if he has no known place of business or fixed residence, it may be made wherever he may be found.††

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#### Form No. 444.

##### ACCEPTANCE FOR ACCOMMODATION.

Defendant states :—

That he accepted the bill mentioned in the plaint for the accommodation of the plaintiff; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

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#### Form No. 445.

##### DENIAL OF ACCEPTANCE, PRESENTMENT, AND PROTEST.

Defendant states :—

That the bill of exchange mentioned in the plaint was not presented for acceptance, nor accepted, as alleged, or at all; and that it was not presented for payment, nor was it protested for non-payment.

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\* Neg. Inst. Act, 1881, ss. 61, 62.

† Neg. Inst. Act, 1881, s. 64.

‡ Neg. Inst. Act, 1881, s. 64.

§ Neg. Inst. Act, 1881, s. 66.

¶ Neg. Inst. Act, 1881, s. 65.

¶¶ Neg. Inst. Act, 1881, s. 74.

\*\* Neg. Inst. Act, 1881, ss. 68, 69.

†† Neg. Inst. Act, 1881, ss. 70, 71.

Form No. 446.

CONTROVERTING EXCUSE FOR NON-PRESENTMENT.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

Defendant states:—

That he denies that any search was made when the said bill of exchange became due to discover the residence and person of the said , at , or elsewhere, or at all, in order that the said bill might be presented to the for payment.

Form No. 447.

PROMISSORY NOTE—DENIAL OF NOTE.

Defendant states:—

That he denies that he made, executed, or delivered, the note mentioned in the plaint.

Form No. 448.

DENIAL OF INDORSEMENT.

Defendant states:—

That he did not indorse the note mentioned in the plaint.

Form No. 449.

THAT DEFENDANT INDORSED AS AGENT.

Defendant states:—

1. That he did not indorse the note mentioned in the plaint.

2. That the following is a true copy of the promissory note made by the firm of B and Co., and on which this suit is brought (copy note and indorsement, with addition of "secretary" to defendant's signature).

3. That at the time of the making and indorsement of said note, this defendant was the secretary of the Company, at , and that he was authorized by them to receive the said note, and to indorse the same to the plaintiffs, as such secretary, of all which facts the plaintiffs had notice

**PART II.**  
**Defences.**

**Div. I.**  
**Suits on**  
**Contract.**

4. That the said Company was, at the time of said indorsement, indebted to the plaintiffs to the amount of Rs.                      for (state what), and said note was received by defendant as such secretary, and not in his individual capacity, and was received by the plaintiffs as an obligation of the said Company on account of said precedent debt due to them from said Company, and for, and on account of, no other consideration whatever, and that the defendant received no consideration therefor.

**Agent how to Sign.**—The agent having authority to sign may either sign the principal's name simply, or he may sign by procuration, or in such form as to denote that it is an agent, and not the principal, who signs; and an agent signing without indicating that he signs as agent is personally liable.\*

**Form No. 450.**

**DENIAL OF NOTICE OF DISHONOUR.**

**Defendant states :—**

That notice of dishonour of the note mentioned in the plaint was not given to him.

**Notice How Given.**—Notice of dishonour may be oral or written, and, if written, may be sent by post.†

**Notice of Protest when Necessary.**—When the note or bill is required by law to be protested, notice of protest must be given, instead of notice of dishonour.‡

**When Notice Unnecessary.**—Notice of dishonour is unnecessary :—

1. When it is dispensed with by the party entitled thereto ;
2. In order to charge the drawer when he has countermanded payment ;
3. When the party charged could not suffer damage for want of notice ;
4. When the party entitled to notice cannot, after due search, be found ; or the party bound to give notice is, for any other reason, unable, without any fault of his own, to give it ;
5. To charge the drawers when the acceptor is also a drawer ;
6. In the case of a promissory note which is not negotiable ;
7. When the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument ;§

\* Neg. Inst. Act, 1881, s. 28.

† Neg. Inst. Act, 1881, s. 102.

‡ Neg. Inst. Act, 1881, s. 94.

§ Neg. Inst. Act, 1881, s. 98.

Form No. 451.

ALTERATION OF INSTRUMENT.

PART II.  
Defences.

DIV. I.  
Suits on  
Contract.

Defendant states :—

That after the making (or acceptance) and issue of said note (or bill), and before this suit, the same was materially altered, without the consent of the defendant, by cutting off the signature of A B as a joint maker thereof (or by adding the words “payable at \_\_\_\_\_,” or otherwise, as the case may be).

**Effect of Alteration.**—Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto; unless it was made in order to carry out the common intention of the original parties; and any such alteration, if made by an indorser, discharges his indorser from all liability to him in respect of the consideration thereof. But an acceptor or indorser is bound by his acceptance or indorsement notwithstanding any previous alteration.\*

**What is a Material Alteration.**—In England it has been held that the addition of a new maker to a joint and several promissory note after issue was a material alteration which avoided it;† so also, where a particular consideration is substituted for the words value received,‡ or a bill payable three months after date is converted into a bill payable three months after sight,§ or the date of a bill payable on demand is altered,|| or the specified rate of interest is altered from 4 per cent. to 5 per cent. or *vice versa*,¶ or a particular rate of exchange is indorsed on a bill which does not authorize this course,\*\* or a place of payment is added without the acceptor’s consent.††

Form No. 452.

THAT THE NOTE WAS GIVEN FOR GOODS SOLD BY MEANS OF FRAUD.

Defendant states :—

1. (Allege fraudulent sale.)

2. That said note was given to the plaintiff without any other consideration than said sale.

\* Neg. Inst. Act, 1881, ss. 87, 88.

† Gardner v. Walsh, 8 E. and A. 88.

‡ Knill v. Williams, 10 East., 431.

§ Long v. Moore, 3 Esp. 155n.

|| Vance v. Lowther, 1 Ex. D. 176.

¶ Sutton v. Troomer, 7 B. and C. 416; Oodeychand Boodáji v. Bháskar Jagonnath, L. L. R., 6 Bom. 371.

\*\* Herschfield v. Smith, L. R., 1 C. P. 340.

†† Burehfield v. Moore, 23 L. J., Q. B., 261.

**PART II.** 3. That, immediately on discovering said fraud, the defendant re-  
**Defences.** scinded said contract, and tendered to the plaintiff all that he had re-  
**Div. I.** ceived under the same, upon condition of his returning said note, which  
**Suits on** the plaintiff refused to do.  
**Contract.**

Form No. 453.

NOTE PROCURED BY FRAUD.

Defendant states:—

1. That at the time the note mentioned in the plaint was made, he was indebted to one E F by book account in the sum of Ra.

2. That the plaintiff at the time falsely and fraudulently represented to the defendant that he was the owner and assignee of said account and indebtedness, and thereby, and without any consideration whatever, induced the defendant to make said note to him in satisfaction and discharge of said account.

3, That the said representations were false, and that the plaintiff never was the owner, nor had he any beneficial interest in the same.

4. That the defendant was misled by said false representations (or that the belief of the defendant in the truth of said representations induced him to make said note).

**Effect of Fraud.**—When a negotiable instrument has been obtained from the maker, acceptor, or holder, by means of an offence or fraud, the holder cannot claim the amount thereof, unless he or some one through whom he claims was a holder in due course.\*

**Effect of Forgery.**—A person who claims through a forgery is not a holder in due course, although he has taken the bill for value, and in perfect good faith.†

**Inadequacy of Consideration.**—The Court will afford no protection to persons who wilfully and knowingly enter into extortionate and unreasonable bargains; it is only justified in doing so when the transaction was entered into in ignorance of its unfair nature.‡

\* Neg. Inst. Act, 1881, s. 58.

† British Linen Co. v. Caledonian Insurance Co., 4 Macq. (H. L.) 107; Chalmers on Bills 181.

‡ Mackintosh v. Wingrove, 1 L. R., 4 Cal. 137.

FOURTH SUB-DIVISION.

SUITS FOR COMPENSATION FOR BREACH OF CONTRACT.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

CHAPTER I.

ON BONDS.

Form No. 454.

FAILURE OF CONSIDERATION.

Defendant states :—

1. That he gave the said bond to plaintiff solely in consideration of the performance by the plaintiff of an agreement then made between them, of which agreement a copy is annexed as a part of this written statement.

2. That this defendant duly performed all the conditions thereof on his part.

3. That the plaintiff (allege breach, as in a suit on the contract).

CHAPTER II.

FOR BREACH OF PROMISE TO MARRY.

Form No. 455.

DENIAL OF PROMISE.

Defendant states :—

That he never promised to marry the plaintiff.

**Mitigation of Damages.**—The defendant may prove in mitigation of damages, that his relations disapproved of the match,\* or that the plaintiff is a person, either of bad character, or of coarse and brutal manners,† or that she is destitute of fortune, or that her conduct before or since the breach shows that it has not affected her much.‡

\* Irving v. Greenwood, 1 O. and P. 350.

† Tayl. S. 332.

‡ Lewis v. Cook, 4 Esp. 256.

**PART II.**  
**Defences.**

**Form No. 456.**

**DENIAL OF PLAINTIFF'S READINESS AND OFFER TO MARRY.**

**DIV. I.**  
**Suits on**  
**Contract.**

Defendant states:—

That he denies that the plaintiff has been ready and willing to marry the defendant, or that she ever did offer to marry him as alleged, or at all.

**Form No. 457.**

**DENIAL OF BREACH.**

Defendant states:—

That he has not refused to marry the plaintiff; but on the day of 18, and ever since, he has been ready and willing to marry her, but at the date above mentioned, and at all times since then, the plaintiff has refused to marry this defendant.

**Form No. 458.**

**THAT PLAINTIFF WAS OF BAD CHARACTER.**

Defendant states:—

1. That at the time mentioned as the time of said supposed promise, and on the day of 18, at, the plaintiff, without the connivance of the defendant, had carnal connexion with one C D.

2. That, upon being informed thereof, he refused to marry the plaintiff.

**Plaintiff's Immorality.**—It is a good defence that since the promisee defendant has discovered that plaintiff had been guilty of gross immorality or depraved conduct, of which defendant was ignorant. §

**Other Defences.**—The following are also good defences:—1st, that the defendant promised conditionally, and that the condition has not been fulfilled; 2nd, that the plaintiff has been guilty of material misrepresentations as to the real circumstances of his or her family, and his or her previous life; ¶ 3rd, that plaintiff has exonerated the defendant from his or her promise, which may be implied by the conduct of the parties. ¶

\* Irving v. Greenwood, 1 C. and P. 350. † Wharton v. Lewis, 1 U. and P. 529.

‡ Davis v. Bomford, 6 H. and N. 245.

CHAPTER. III.  
ON CHARTER-PARTIES.

PART II.  
Defences.

Div. I.  
Suits on  
Contract.

Form No. 459.

DENIAL TO OFFER TO PERFORM.

Defendant states :—

That at the time fixed by the agreement referred to in the plaint, the plaintiff was not ready and willing, or in a condition, to receive the goods mentioned in the said agreement (or any part thereof).

**Implied Condition.**—In a contract of affreightment, whether under a charter-party, bill of lading, or otherwise, it is implied that at the commencement of the voyage the ship is seaworthy.\*

**Conditions Precedent.**—When the shipowner has contracted to give a certain notice to a charterer, or to do any act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods until the shipowner has given him that notice, or has done that act.†

CHAPTER IV.  
ON CONTRACTS OF EMPLOYMENT.

Form No. 460.

DENIAL OF CONTRACT.

Defendant states :—

That he denies that he agreed with the plaintiff, as alleged, or at all.

**Misconduct.**—A servant who misconducts himself or disobeys a lawful order may be dismissed without notice.‡

In a suit for wrongful dismissal, where the defendant pleads justification by reason of the plaintiff's misconduct, the defendant at the hearing cannot give evidence of a transaction involving instances of misconduct not set forth in the written statement.§

\* *Richardson v. Stanton*, L. R., 7 C. P. 421; L. R., 9 C. P. 390; 43 L. J., C. P., 230; 45 L. J., C. P., 78; *Kopitoff v. Wilson*, 1 Q. B. D. 377; 45 L. J., Q. B., 486; *Cohn v. Davidson*, 2 Q. B. D. 455; 46 L. J., Q. B., 305.

† *Fleming v. Koegler*, L. R., 4 Cal. 237.

‡ *Lilley v. Elwin*, 11 Q. B. 742.

§ *Munchohshaw Bezonji v. The New Dhurumsey Spinning and Weaving Company*, L. L. R., 4 Bom. 576.



**PART II.** **Apprentices.**—It is a good defence to an action for not teaching and providing for an apprentice, that he quitted the service without leave,\* or that he refused to be taught.†

**DIV. I.**  
**Suits on**  
**Contract.**

---

**Form No. 461.**

**DENIAL OF PLAINTIFF'S PERFORMANCE.**

**Defendant states :—**

That the plaintiff has not performed the conditions of said agreement on his part, but, on the contrary, has wholly omitted (here state breach).

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**CHAPTER V.**

**ON CONTRACTS OF INDEMNITY.**

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**Form No. 462.**

**DENIAL OF PERFORMANCE.**

**Defendant states :—**

1. That he denies that the plaintiff performed the conditions, or any of the conditions, on his part in the agreement referred to in the plaint.
2. (Allege negligence in defending the suit, and want of notice to the defendant of the pendency of the same.)

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**CHAPTER VI.**

**ON CONTRACTS FOR THE SALE OF GOODS.**

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**Form No. 463.**

**ALLEGING BREACH BY PLAINTIFF.**

**Defendant states :—**

1. That it was a part of the agreement referred to in the plaint that the plaintiff should deliver the goods sold at
2. That the said goods have not been so delivered.

---

\* *Hughes v. Humphreys*, 6 B. and C. 68.

† *Raymond v. Minton*, L. R., 1 Ex. 244; 35 L. J., Ex., 153.

**Effect of Breach by Plaintiff.**—(Where a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.\* So, where the defendant undertook to deliver straw periodically, in certain quantities, receiving payment on each delivery, and plaintiff refused to pay for the loads as delivered, it was held that defendant was entitled to treat the contract as abandoned, and, therefore, was not liable for ceasing to perform his part.†

PART II.  
Defences.  
Div. I.  
Suits on  
Contract.

---

**Form No. 464.**

**BREACH OF WARRANTY BY PLAINTIFF.**

Defendant states :—

1. That the goods mentioned in the plaint were warranted by the plaintiff to be (genuine French broadcloth).
2. That they were not (genuine French broadcloth).

---

**Form No. 465.**

**BREACH OF WARRANTY AS TO QUALITY.**

Defendant states :—

1. That it was part of the agreement referred to in the plaint that the wheat therein mentioned should be of a first-class milling quality.
2. That the said wheat was not of a first-class milling quality, but (state wherein the quality was defective).

---

**CHAPTER VII.**

**ON CONTRACTS FOR THE SALE OF LANDS.**

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**Form No. 466.**

**DENIAL OF CONTRACT.**

Defendant states :—

That he did not contract with the plaintiff as alleged, or at all.

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\* Contract Act, 1872, s. 39.

† Withers v. Reynolds, 2 B. and Ad. 882.

**PART II.**  
**Defences.**

**DIV. I.**  
**Suits on**  
**Contract.**

**Form No. 467.**

**DENIAL OF BREACH.**

**Defendant states :—**

That the defendant duly performed all the conditions of said contract on his part ; and (here state performance, pursuing the words of the contract, if it be in the affirmative ; and stating particular acts, if it be in the alternative, in any case in which this can be done without too great prolixity).

---

**Form No. 468.**

**DENIAL OF PLAINTIFF'S PERFORMANCE.**

**Defendant states :—**

That the plaintiff has not performed the conditions of said contract on his part, but, on the contrary, has wholly omitted (here state breach, as if in a plaint against him).

---

**Form No. 469.**

**DENIAL OF TITLE.**

**Defendant states :—**

That the plaintiff was not, is not, and never was, the owner of the premises described in the plaint.

---

**Form No. 470.**

**ALLEGING BREACH BY PLAINTIFF.**

**Defendant states :—**

1. That the plaintiff warranted the property, mentioned in the agreement set forth in the plaint, to be free from all incumbrances.

2. That there was then, and still is, a mortgage on the same in the sum of Rs. , unsatisfied, recorded in Book No. 1, in the office of the Sub-registrar of , and the same then was, and still is, a valid and subsisting lien and incumbrance upon the said premises.

**CHAPTER VIII.  
ON OTHER CONTRACTS.**

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**PART II.  
Defences.**

**DIV. I.  
Suits on  
Contract.**

**Form No. 471.**

**BUILDER'S CONTRACT—WORK NOT FINISHED.**

**Defendant states :—**

That the said work was not completed, in a good and workmanlike manner, on or before the day limited therefor, in the contract set forth in the plaint ; but, on the contrary, the said work on that day, and from thence to the commencement of this suit, was and still is incomplete and unfinished.

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PART II.  
Defences.

DIV II.  
Suits for  
Compensation for  
Wrongs.

## SECOND DIVISION. SUITS FOR COMPENSATION FOR WRONGS.

### FIRST SUB-DIVISION. INJURIES TO THE PERSON.

#### CHAPTER I. ASSAULT AND BATTERY.

##### Form No. 472. GENERAL DENIAL.

Defendant states:—

That he did not commit the acts alleged, or any of them (or that he denies each and every allegation in the plaint contained.

##### Form No. 473. SELF-DEFENCE.

Defendant states:—

That the plaintiff first assaulted the defendant, who thereupon necessarily committed the acts complained of, in self-defence.

**Self-defence.**—It has been decided with reference to this defence that it is not every assault that will justify every battery, and that it is a matter of evidence whether the assault was proportionable to the battery. Thus, if A strikes B, B cannot justify drawing his sword and cutting off A's hand.

##### Form No. 474. ACTS DONE TO PRESERVE THE PEACE.

Defendant states:—

1. That he did not strike or wound the plaintiff.
2. That at the time mentioned in the plaint the plaintiff made an assault on one B, and was then and there beating him.
3. That thereupon the defendant, in attempting to preserve the peace and prevent the plaintiff from further so doing, gently laid his hands upon the plaintiff, by which plaintiff suffered no injury.

Form No. 475.

DEFENCE OF POSSESSION OF DWELLING.

Defendant states:—

1. (Deny beating and wounding.)

2. That at the time mentioned in the plaint, the defendant was lawfully possessed of house No.      in      street.

3. That defendant being so possessed thereof, the plaintiff was unlawfully thereon, and (state unlawful acts he was doing).

4. That thereupon the defendant, in defence of the possession of his dwelling, gently laid his hands upon the plaintiff in order to remove him, as he lawfully might.

**Defence of Possession.**—This defence refers merely to the case of one who trespasses without violence in the house of another; in the case of one making a forcible entry the defence is different—see next form.

Form No. 476.

RESISTANCE OF FORCIBLE ENTRY.

Defendant states:—

1 and 2. (As in preceding form.)

3. That the plaintiff, then and there, with force and violence, attempted to break into the said dwelling, without the leave and against the will of the defendant.

4. That the defendant thereupon, in order to preserve the peaceable possession thereof, resisted the plaintiff's entrance, and in doing so necessarily assaulted and beat the plaintiff, as he lawfully might; and if the plaintiff sustained any damage, it was occasioned by his own wrong.

**Other Defences.**—Leave and license is a good answer; \* that the injury was unavoidable, the result entirely of a superior agency, and the conduct of the defendant free from fault has been sustained.† Where the plaintiff wrongfully holds possession of land against the will of the owner, who assaults him while endeavouring to regain possession, no action will lie.‡ A parent or schoolmaster, sued for an assault committed on a youth, may plead that the assault complained, of was moderate and reasonable chastisement.

\* Christopher v. Bare, 11 Q. B. 473, 477; Latter v. Braddell, 50 L. J., C. P., 166.

† Gibbons v. Peppin, 1 Ld. Raym. 38.

‡ Harvey v. Bridges, 14 M. and W. 437; see also Blades v. Higgs, L. J., 30 C. P.

PART II,  
Defences.DIV. II.  
Suits for  
Compensation for  
Wrongs.

## Form No. 477.

## JUSTIFICATION BY MASTER OF VESSEL.

Defendant states:—

That at the time of the alleged assaulting, beating, and ill-treating, he was the master of the ship called .

2. That the plaintiff was then on board said ship as a seaman (state excuse for beating him, such as mutiny, &c.).

3. Wherefore the defendant, for the preservation of the peace, and to preserve due order on said ship (state what was done).

## Form No. 478.

JUSTIFICATION OF REMOVING PLAINTIFF FROM RAILWAY CARRIAGE  
FOR NON-PAYMENT OF FARE.

Defendant states:—

1. That the defendant was, before and at the time when the said supposed grievances were committed, the guard and had charge of a passenger train on the .

2. That one of the regulations of said Railway Company was, that no person should be permitted to be and remain on such train without having a ticket therefor, duly obtained of their authorized agents.

3. That at the time mentioned in the plaint, the plaintiff was on the said train, without having a ticket therefor as aforesaid, and then and there refused to purchase a ticket or to pay his fare.

4. That defendant then and there requested the plaintiff to leave the said train, which the plaintiff refused to do; whereupon the defendant then and there gently laid his hands upon the plaintiff, and removed him from the train, doing no unnecessary violence, as he lawfully might do.

CHAPTER II.  
FALSE IMPRISONMENT.

PART II.  
Defences.

DIV. II.  
Suits for  
Compensation for  
Wrong.

Form No. 479.

DENIAL OF ARREST.

Defendant states:—

That he did not cause said order of arrest (or warrant) to be issued.

Form No. 480.

DENIAL OF WANT OF PROBABLE CAUSE.

Defendant states:—

That he did not, falsely and maliciously, or without reasonable or probable cause, cause the plaintiff to be arrested; nor did he cause plaintiff to be arrested at all.

Form No. 481.

JUSTIFICATION OF ARREST UPON SUSPICION OF AN OFFENCE.

Defendant states:—

1. That immediately before the time mentioned in the plaint an offence was committed (briefly state the offence and causes of suspicion against the plaintiff).

2. That thereupon the defendant, who was and is an (Inspector of Police), having reasonable cause to suspect the plaintiff of having committed such offence, arrested him, and brought him before A B, a Magistrate, at \_\_\_\_\_, to be dealt with according to law.

Form No. 482.

JUSTIFICATION OF ARREST UNDER CRIMINAL PROCESS.

Defendant states:—

1. That before and at the time of the committing of the alleged trespasses, he was a constable within and for the town of \_\_\_\_\_.

2. That a warrant, duly issued by A B, a Magistrate of said town of \_\_\_\_\_, and directed to the defendant, was delivered to him, as



**PART II.** such constable, to be executed; whereby he was commanded to arrest  
**Defences.** the plaintiff, and bring him forthwith before said Magistrate, there to

**DIV. II.** answer to the charge of having stolen the goods of one to the  
**Suits for** value of Rs. (set forth the tenor of the warrant).  
**Compensation for**

**Wrongs,** 3. That by virtue of said warrant defendant arrested the plaintiff, and had him in his charge until he was discharged (or state the facts).

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## CHAPTER III.

### LIBEL AND SLANDER.

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#### Form No. 483.

#### DENIAL OF PLAINTIFF'S PROFESSION.

Defendant states:—

That he denies that the plaintiff was or is a physician, either as alleged or otherwise.

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#### Form No. 484.

#### DENIAL OF PUBLICATION.

Defendant states:—

That he denies that he published (or spoke) the said words.

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#### Form No. 485.

#### DENIAL THAT WORDS DEFAMATORY.

Defendant states:—

That he denies that the said words bear the meaning placed upon them by the plaintiff.

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#### Form No. 486.

#### JUSTIFICATION—TRUTH OF PUBLICATION—WHEN CHARGE IS SPECIFIC.

Defendant states:—

That the supposed defamatory words in the plaint set forth are each and all of them true.

Form No. 487.

THE SAME—WHEN THE CHARGE IS GENERAL.

Defendant states:—

That on the       day of       18       , at       , the plaintiff stole from the defendant one bale of hay, to which the defendant referred when speaking (or writing or printing) the words stated in the plaint.

PART II.  
Defences.

DIV. II.  
Suits for  
Compensation for  
Wrongs.

Form No. 488.

DENIAL OF MALICE.

Defendant states:—

1. That the articles in the plaint mentioned, as having been charged by defendant to have been stolen by the plaintiff, had, at the time mentioned in the plaint, been stolen from the defendant.

2. That defendant is informed and believes that the plaintiff has been and is guilty of the charge in the plaint alleged to have been made against her by the defendant, and that whatever the defendant has said concerning the plaintiff she has said in the full belief of its truth, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff.

Form No. 489.

MITIGATION—REPUBLICATION OF MATTER AS NEWS.

In mitigation of compensation to which the plaintiff might otherwise appear entitled by reason of the publication of the said supposed libellous articles, this defendant alleges that all the matters and things stated in the said articles were, on the       day of       18       , at       , currently reported and believed in, and were published in a certain newspaper called       , published at       , and were so communicated to this defendant, and were published by him as matters of current public news, the defendant verily believing the same to be true.

**PART II. Mitigation of Damages.**—Defendant may prove in mitigation of damages that the plaintiff published libels of him, provided that they relate to the same matter; \* or the bad reputation of plaintiff; † or that rumours of the facts asserted were prevalent in the neighbourhood; ‡ or that the statement was copied from another paper. §

**DIV. II. Suits for Compensation for Wrongs.**

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**Form No. 490.**

**PRIVILEGED PUBLICATION.**

Defendant states:—

1. That on the       day of       18       , a suit was tried in the Court of       , in which A B was plaintiff, and the plaintiff herein was defendant (or the plaintiff was tried before the Sessions Judge of       on a charge of       , or otherwise as the case may be).

2. That the article published in the defendant's newspaper mentioned in the plaint was a fair and true report of the testimony of one of the witnesses named       (or was a fair and true statement of the proceedings therein) made in the course of the said trial.

---

**Form No. 491.**

**PRIVILEGED COMMUNICATION.**

Defendant states:—

1. That A B, mentioned in the plaint, inquired of the defendant the character of the plaintiff, with a view of employing him as a clerk (or as the case may be), and the defendant then stated to him the matter referred to in the plaint.

2. That the defendant had probable cause for believing, and did believe, the same to be true.

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\* *Watts v. Fraser*, 7 A. and E. 223; *May v. Brown*, 3 B. and C. 111; *Tarpley v. Blaby*, 2 Bing. N. C. 437.

† *Richards v. Richards*, 2 M. and Rob. 557.

‡ *Richards v. Richards*, *supra*.

§ *Saunders v. Mills*, 6 Bing. 218.

**CHAPTER IV.  
PERSONAL INJURY CAUSED BY NEGLIGENCE.**

**Form No. 492.**

**DENIAL OF OWNERSHIP AND POSSESSION.**

**Defendant states:—**

That at the time of the grievance alleged the defendant was not the owner, and had not the possession or control of the premises in which said hole or hatchway was.

**Form No. 493.**

**ANOTHER FORM.**

**Defendant states:—**

That he denies that the carriage mentioned in the plaint was the defendant's carriage, or that it was under the charge or control of the defendant's servants. The carriage belonged to A B and Co. of Street , livery stable-keepers, employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said A B and Co.

**Measure of Damages.**—In an action for injuries caused by the defendant's negligence, a sum recovered by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.\*

**Form No. 494.**

**PLAINTIFF'S OWN NEGLIGENCE.**

**Defendant states:—**

That the defendant and his servants used due care and diligence about the construction of said building (or, in repairing said street, and replacing the pavement thereof; or in guarding the said excavation with proper bulwarks, and in putting up lights during the night time; or otherwise according to the allegations in the plaint), and that said injury was not caused by any negligence on the part of the defendant or his servants, but was owing to the negligence and fault of the plaintiff himself.

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\* *Bradshaw v. Great Western Railway Company*, L. R., 10 Ex. 1.

**PART II.  
Defences.**

**Div. II.  
Suits for  
Compensation for  
Wrongs.**

PART II.  
Defences.DIV. II.  
Suits for  
Compensation for  
Wrongs.

**Contributory Negligence.**—This is a good defence; if the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff, he cannot recover, although there was negligence in the defendant, but this rule is subject to this limitation, that if the defendant, by the exercise of ordinary care on his part, might have avoided the consequences of the plaintiff's negligence, and yet does not choose to exercise such care, the plaintiff may still recover.\*

There seems to have been some indecision in England on the question how far a child of tender years can be guilty of contributory negligence; on this subject the cases noted below may be consulted.†

## Form No. 495.

## DENIAL OF NEGLIGENCE—PLAINTIFF'S OWN NEGLIGENCE.

Defendant states:—

1. That he denies that his said carriage was turned of Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

2. That the defendant might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

## Form No. 496.

## DENIAL OF POSSESSION OF VISCIOUS DOG.

Defendant states:—

That he does not own the said dog, and never did; and that he was not the possessor of the said dog at the time of the grievances alleged, nor at any other time, before or since.

## Form No. 497.

## DENIAL OF SCIENTER.

Defendant states:—

That at the time of the grievances alleged the defendant did not know, and had no reason to believe, that the said dog was accustomed to bite mankind, or was of a mischievous nature (or otherwise according to the allegations of the plaintiff).

\* *Radley v. L. and N. W. B. Co.*, 1 App. Cas. 754; 46 L. J., H. L., 578; *Davis v. Mann*, 10 M. and W. 546.

† *Lynch v. Nardin*, 1 Q. B. 29; *Abbott v. Macfie*, and *Hughes v. Macfie*, L. R., 38 Ex. 177; *Mangan v. Atterson*, L. R., 1 Ex. 239.

SECOND SUB-DIVISION.

INJURIES TO PROPERTY.

CHAPTER I.

AGAINST AGENTS AND OTHERS FOR NEGLIGENCE.

PART II.  
Defences.

DIV. II.  
Suits for  
Compensation for  
Wrongs.

Form No. 498.

DENIAL OF NEGLIGENCE IN SALE.

Defendant states:—

That he was not negligent in and about selling said goods, but sold the same with due diligence, and for as large a price as he could obtain

Form No. 499.

DENIAL OF NEGLIGENCE IN GIVING CREDIT.

Defendant states:—

That he sold said goods to one A B, who was a merchant at , in good standing and credit, for the sum of Rs. ; and for the payment of said sum he took the bill of the said A B drawn on and accepted by one C D, payable in months after date, which bill was at the time held and considered an approved bill.

Form No. 500.

DENIAL OF INJURY BY DOG.

Defendant states:—

That the said dog did not kill the sheep alleged, or any one of them, nor did he injure or worry them, or any of them.

Form No. 501.

PLAINTIFF'S OWN NEGLIGENCE.

Defendant states:—

That at the time mentioned in the plaint, the defendant was driving his said carriage in the highway, and the horse of the plaintiff, being at the same time there, was so carelessly, negligently, and improperly managed by the plaintiff, that by reason thereof the carriage of

**PART II.** the defendant, without any fault on the part of the defendant, and by  
**Defences.** want of due care in the management of his horse by the plaintiff, was  
**Div. II.** driven against said horse, and thereby said horse sustained the injury  
**Suits for** alleged; and that if any damage happened to said horse, it was caused  
**Compensation for** by such accident, and not by the fault of the defendant.  
**Wrong.**

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## CHAPTER II.

### BAILMENTS.

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#### Form No. 502.

##### DENIAL OF BAILMENT.

Defendant states:—

1. That the goods described in the plaint were not the property of the plaintiff, and were not deposited with the defendant by him or his agents.
2. That the same were the property of one A B, to whom the possession of them belonged when this suit was brought.

**Estoppel.**—A bailee cannot deny that his bailor had, at the time when the bailment commenced, authority to make such bailment; but, if he delivers the goods bailed to another person, he may prove that such other person had a right to them as against the bailor.\*

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## CHAPTER III.

### COMMON CARRIERS.

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#### Form No. 503.

##### DENIAL OF BEING A COMMON CARRIER.

Defendant states:—

That he is not now, and was not at the time mentioned in the plaint, or at any time, a common carrier.

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\* Evidence Act, 1872, s. 117.

Form No. 504.

DENIAL OF EMPLOYMENT.

Defendant states :—

That he did not undertake nor agree to carry the said goods to  
 , nor to deliver them there to , and that said  
 never paid him, nor agreed to pay him, any reward for such service.

PART II.  
 Defences.

DIV. II.  
 Suits for  
 Compensation for  
 Wrongs.

Form No. 505.

DENIAL OF RECEIPT OF GOODS.

Defendant states :—

That the said never delivered to him the goods mentioned  
 in the plaint, and that he never received the same, or any of them.

Form No. 506.

DENIAL OF LOSS.

Defendant states :—

That he denies that said goods were lost to the said , and  
 denies that he was negligent in and about the transporting, storing, or  
 unloading of the same.

Form No. 507.

THAT CONTRACT WAS SPECIAL.

Defendant states :—

That the goods mentioned in the plaint were delivered by the  
 plaintiff to, and received by, defendant, upon a special contract, whereby  
 it was provided that (state terms of contract).

Form No. 508.

DAMAGE BY PLAINTIFF'S FAULT.

Defendant states :—

1. That the goods mentioned in the plaint were a dangerous and  
 explosive substance, known as nitro-glycerine, which the plaintiff then  
 well knew, but which the defendant did not know, and could not  
 reasonably be expected to know.



PART II.  
Defences.

DIV. II.  
Suits for  
Compensation for  
Wrongs.

2. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in with other goods, without danger or injury.

3. (State special contract, if any, which was thereby violated.)

## CHAPTER IV. CONVERSION.

### Form No. 509.

#### DENIAL OF PLAINTIFF'S OWNERSHIP.

Defendant states:—

That he denies that at the time of the alleged conversion, the plaintiff was the owner, or entitled to the possession, of the goods mentioned in the plaint, or any part of them.

Defences.—The defendant may, if he is not a bailee or agent, set up the title of a third person;\* and also even where he is agent or bailee, when the bailment has been determined, or where a third person claims the goods,† but a mere wrongdoer cannot set up the *jus tertii*.‡

### Form No. 510.

#### DENIAL OF BAILMENT.

Defendant states:—

That he never received the plaintiff's goods mentioned in the plaint, as baillee, as alleged, or at all.

### Form No. 511.

#### LIEN UPON GOODS DETAINED.

Defendant states:—

1. That on the       day of       18       , the plaintiff deposited the goods mentioned in the plaint with the defendant for storage, agreeing to pay for the same Rs.       per ton per month.

\* Leake v. Loveday, 4 M. and G. 972.       † Biddle v. Bond, 34 L. J., Q. B., 187.

‡ Jeffries v. Great Western Railway Co., 25 L. J., Q. B., 107.

2. That the defendant has always been, and still is, ready and willing to deliver the said goods to the plaintiff, upon the payment of the storage money due.

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Defences.

3. That the plaintiff has not paid or tendered to the defendant the storage money due.

Div. II.  
Suits for  
Compensation for  
Wrongs.

**Innkeepers.**—An innkeeper has a lien on the goods of his guest for his charges, but he may not detain the clothes of his guest, as that would be equivalent to an imprisonment.\*

### Form No. 512

#### DENIAL OF PLAINTIFF'S RIGHT TO POSSESSION.

Defendant states:—

1. That he denies that the plaintiff at the time mentioned in the plaint, or ever, or at all, was entitled to the possession of the goods mentioned in the plaint, or any of them.

2. That he denies that the said goods, or any of them, are, or ever were, the property of the plaintiff, but, on the contrary, the same were and still are the property of

### Form No. 513.

#### DEFENDANT PART-OWNER.

Defendant states:—

That at the time mentioned in the plaint, he was, and still is, the owner of an undivided half of said goods; and defendant was then, and still is, in the possession of the whole of said goods.

**Joint Owners.**—A joint owner cannot maintain a suit for conversion against a co-owner, unless the act done is inconsistent with the joint ownership, as a complete destruction of the goods,† or a sale of them.‡

\* Sunbolf v. Alford, 3 M. and W. 248.

† Jacobs v. Seward, L. R., 5 H. L. 464.

‡ Barton v. Williams, 5 B. and A. 403; Harper v. Godsell, L. R., 5 Q. B. 422.

PART II.  
Defences.CHAPTER V.  
NUISANCE.

## Form No. 514.

## DENIAL OF PLAINTIFF'S TITLE AND POSSESSION.

Defendant states:—

That the plaintiff was not, is not now, and never was, the owner of, or possessed of, the premises described in the plaint, or any part thereof.

## Form No. 515.

## DENIAL OF NUISANCE.

Defendant states:—

That his premises have not been used as a slaughter-house, either as alleged, or otherwise (or, that he did not erect said dam as alleged, or otherwise, or at all).

CHAPTER VI.  
SLANDER OF TITLE.

## Form No. 516.

## DENIAL OF INJURY AND, MALICE.

Defendant states:—

That the words charged in the plaint to have been spoken were and are true.

2. That he denies that by the words alleged in the plaint to have been spoken by him, the plaintiff was injured in any manner, or to any amount whatever.

3. That he denies that the said words were uttered maliciously.

CHAPTER VII.  
TRESPASS.

## Form No. 517.

## TRESPASS TO LAND—DENIAL OF PLAINTIFF'S TITLE.

Defendant states:—

That the said dwelling-house (or land) was not the plaintiff's, as alleged, or at all).

Form No. 518.

DENIAL OF PLAINTIFF'S POSSESSION.

Defendant states :—

That the plaintiff was not possessed of the lands mentioned in the  
plaint, or any part thereof.

PART II.  
Defences.

DIV. II.  
Suits for  
Compensation for  
Wrongs.

Form No. 519.

JUSTIFICATION—FENCES DEFECTIVE.

Defendant states :—

1. That plaintiff and defendant occupy farms contiguous to each other, and separated by a fence which the plaintiff was bound to keep in repair. The plaintiff neglected to keep the fence in repair, by means whereof the cattle of the defendant escaped over the fence and into the premises of the plaintiff, and thereby the defendant committed, by his cattle and without his fault, the supposed injury set forth in the plaint as done by defendant's cattle.

2. That the defendant, as soon as he had notice of the escape of his cattle, entered upon the plaintiff's premises to, and did, drive them out, doing no unnecessary damage, which is the alleged trespass.

Form No. 520.

JUSTIFICATION—REBUILDING FENCE.

Defendant states :—

1. That the fence mentioned in the plaint was a part of the division fence between the lands of the plaintiff and of the defendant, which, by a previous agreement between them, the defendant was bound to make and keep in repair.

2. That he took up and renewed the part of said fence which he was bound to repair, and replaced the same with a new fence upon the said division line, and with as little injury as possible to the plaintiff's crops, as he had a right to do; which are the acts complained of.

PART II.  
Defences.

## Form No. 521.

## LEAVE AND LICENSE.

Div. II.  
Suits for  
Compensation for  
Wrongs.

Defendant states:—

That the acts complained of were done by leave of the plaintiff.

**Ways of Necessity.**—When one man grants land to another, to which there is no access, except on the land of a stranger, or over the land of the grantor, the grantee obtains a right of way over the land of the grantor; and if the owner of two closes having no way to one of them, but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity.\*

## Form No. 522.

## TRESPASS TO GOODS—DENIAL OF RIGHT TO POSSESSION.

Defendant states:—

That the plaintiff was not entitled to the possession of the goods mentioned in the plaint.

## Form No. 523.

## DENIAL OF BREAKING.

Defendant states:—

That he did not break nor enter the premises of the plaintiff as alleged, or in any other manner.

## Form No. 524.

## DENIAL OF TAKING.

Defendant states:—

That he did not take, nor carry away, said goods, as alleged, or at all.

## Form No. 525.

## JUSTIFICATION—EXECUTION.

Defendant states:—

1. That at the time mentioned in the plaint he was bailiff of the Court of

2. That heretofore, in a suit in said Court, wherein A B was plaintiff, and C D, the plaintiff herein, was defendant, decree was, on the day of 18, passed in favour of the said A B, the

\* East Co. Ry. Co. v. Darling, 5 C. B. N. S. 821; 22 L. J., C. P., 202; Gayford v. Moffatt, L. R., 4 Ch. App. 133.

plaintiff in said suit, against the said C D, the defendant therein, for the sum of Rs. , as by the record of said suit more fully appears.

PART II  
Defences.

3. That afterwards, on the day of 18 , a warrant of attachment of the moveable property of C D, in execution of said decree, was issued, and directed to and delivered to this defendant, as bailiff of said Court, whereby this defendant was commanded to attach the moveable property of the said C D mentioned in a list thereunto annexed, or which should be pointed out to this defendant by the said A B, and to hold the same until the said C D should pay this defendant the said sum of Rs. , together with Rs. , the costs of said attachment.

Div. II.  
Suits for  
Compensation for  
Wrongs.

4. That under and by virtue of the said warrant of attachment this defendant, as bailiff of the said Court, and not otherwise, attached certain goods, of the description of those mentioned and described in the plaint, and took the same into his possession, which the defendant believes to be the goods referred to in the plaint, and that said attachment and taking aforesaid constitute the supposed wrongful taking in the plaint alleged.

5. That defendant verily believes that the said goods were at the time of such attachment the property of said C D.

#### Form No. 526.

#### JUSTIFICATION—SEARCH-WARRANT.

Defendant states:—

1. That at the time mentioned in the plaint, A B, a Magistrate of , issued a warrant, under his hand and seal, directed to this defendant, reciting that whereas information had been laid before him that the house (describe same as in warrant) was used as a place for the deposit of stolen property, and commanding and authorizing this defendant to enter said house, with such assistance as might be required, and to use, if necessary, reasonable force for that purpose, and to search every part of said house, and to seize and take possession of any property there found, and to forthwith take the same before the said Magistrate.

2. That by virtue of said warrant this defendant went to said house, which is the house mentioned in the plaint, and then, finding the door thereof shut, did demand and require that said door should be

**PART II.** opened, which was then and there refused, and thereupon this defend-  
**Defences.** ant, in order to execute said warrant, broke open said door, doing as  
**Div. II.** little damage as possible, and took and carried away therefrom (name  
**Suits for** the goods), and brought the same before said Magistrate, as he might  
**Compensation for** lawfully do, which are the acts of which plaintiff complains.  
**Wrongs.**

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## CHAPTER VIII.

### WASTE.

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Form No. 527.

#### DENIAL OF WASTE.

Defendant states:—

1. That he did not commit the waste and destruction aforesaid in manner as the plaintiff has in his plaint alleged, or in any manner, or at all.

That the defendant does not hold the said premises under, or as tenant to, the plaintiff in manner as the plaintiff in his plaint has alleged, or at all.

3. That the said did not demise the said premises to the said in manner as the plaintiff has in his plaint alleged, or in any manner, or at all.

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THIRD DIVISION.

SUITS FOR POSSESSION OF SPECIFIC  
PROPERTY.

PART II.  
Defences.

DIV. III.  
Suits for  
Possession  
of Specific  
Property.

CHAPTER I.

IMMOVEABLE PROPERTY.

Form No. 528.

DENIAL OF PLAINTIFF'S TITLE AND RIGHT TO POSSESSION.

Defendant states :—

That the plaintiff, at the commencement of this suit, was not the owner of the land described in the plaint ; nor was he ever possessed of the same, or any part thereof ; nor was he entitled to the possession thereof, at any time, or at all.

Form No. 529.

EQUITABLE ESTATE IN DEFENDANT.

Defendant states :—

1. That on the      day of      18      , the plaintiff executed and delivered to the defendant his agreement in writing, for the sale and conveyance to the defendant of the premises described in the plaint, a copy of which agreement is hereunto annexed, and marked "Exhibit No. 1."

2. That the defendant fully performed all the conditions of said agreement on his part, yet the said plaintiff has not conveyed the said premises to the defendant, but refuses and neglects to do so, though often requested thereto.

Wherefore defendant prays that the plaintiff be ordered to convey said premises to the defendant.



PART II.  
Defences.DIV. III.  
Suits for  
Possession  
of Specific  
Property.

## Form No. 530.

## ADVERSE POSSESSION.

Defendant states :—

That at the time of the execution and delivery of the conveyance mentioned in the plaint the lands therein described were in the actual possession of this defendant, who then and ever since claimed to be the owner thereof, and now claims, adversely to the said grantor.\*

**Title by Adverse Possession.**—The principle adopted in this country appears to be, that the period of possession which is sufficient to bar the remedy is also sufficient to transfer the right.º

One who holds on behalf of another does not by mere denial of that other's title make his possession adverse, so as to give himself the benefit of the Limitation Act;† and non payment of rent for more than twelve years does not constitute adverse possession, where the possession may be referred to a contract of tenancy, under which the tenant entered,‡ for if once the relation of landlord and tenant is established, it is for the defendant to prove its determination by affirmative proof, over and above the mere failure to pay rent.§

**Adverse Possession—Practice.**—When the defendant pleads limitation, plaintiff is bound not only to prove his title, but also to show affirmatively that his cause of action accrued within twelve years; he must succeed upon the strength of his own title, not upon the weakness of his opponents;|| but when plaintiff claims under a specific title, and more than twelve years' possession, he is entitled to a decree on the strength of his twelve years' possession, even though he fail to make out his specific title;¶ and conversely, where defendant sets up a specific title, and also pleads limitation, he cannot be ejected if he prove more than twelve years' adverse possession alone.ºº

\* *Ameeroonissa Begum v. Amir Khan*, 17 W. R. 119; *Raja Sahoy Singh v. Kooldeed Singh*, 15 W. R. 80; *Raja Baradakant Roy Bahadur v. Prankkishna Paroi*, 3 B. L. R., A. C., 343.

† *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*, 1, L. R., 4 Cal. 327.

‡ *Dádobá v. Krishna*, 1, L. R., 7 Bom. 34; *Tátíá v. Sadáshiv*, 1, L. R., 7 Bom. 40.

§ *Prem Sukh Das v. Bhupia*, 1, L. R., 3 All. 517; *Bungo Lall Mundul v. Abdool Guffoor*, 1, L. R., 4 Cal. 314; 3 C. L. R. 119; *Pudar Bindoo Mahantee v. Mohesh Chunder Sein*, 20 W. R. 183.

|| *Lutchoo Khan v. W. Foley*, 24 W. R. 273.

¶ *Goluck Chunder Masanta v. Nundo Coomar Roy*, 1, L. R., 4 Cal. 699; *Gossain Dase Chunder v. Issur Chunder Nath*, 1, L. R., 3 Cal. 224; *Sambhubhai Harsandas v. Shiviláldás Sadáshivdás Desái*, 1, L. R., 4 Bom. 89; *Peuráj Bhaváuirám v. Nárayan Shivarám Khisti*, 1, L. R., 6 Bom. 215.

ºº *Lokenath Misser v. Moharanees Sreemutty*, 24 W. R. 147.

In a suit for possession against a tenant who is really a trespasser, the defendant, merely by alleging tenancy in his written statement, does not preclude himself from setting up the defence of limitation.<sup>a</sup>

PART II.  
Defences.

**Symbolical Possession.**—Symbolical possession, such as may be given by the Nazir of a Court by sticking a bamboo into the ground, or the like, of a dwelling house, or of a share of a dwelling-house, of which actual possession might have been granted, is not such a ~~bona fide~~ possession as will save limitation; † such a possession amounts to an actual transfer of possession as between the parties to the suit; but it has no such operation against third persons who are not parties to the suit.‡

Div. III.  
Suits for  
Possession  
of Specific  
Property.

**Co-sharers.**—Possession of land does not constitute adverse possession in relation to a co-sharer, unless the latter claims, or asserts, some right in the land which is denied by the sharer in possession.§

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<sup>a</sup> *Dino Monee Debia v. Doorga Pershad Mojoomdar*, 21 W. R. 70.

† *Shoteenath Mookerjee v. Obhoy Nund Roy*, I. L. R., 8 Cal. 331; *Pearce Mohun Poddar v. Juggobuddho Sein Baboo Shem Chunder*, 24 W. R. 418.

‡ *Ranjit Singh v. Bunwari Lal*, I. L. R., 10 Cal. 993; *Juggobundhu Mookerjee v. Ram Chunder Bysack*, I. L. R., 5 Cal. 584; 5 C. L. R. 548.

§ *Shurfaunnissa Bibee Chowdhraïn v. Kylaah Chunder Gungopadhya*, 25 W. R. 53.

PART II.  
Defences.

DIV. IV.  
Suits for  
Special  
Relief.

## FOURTH DIVISION. SUITS FOR SPECIAL RELIEF.

### CHAPTER I. ADMINISTRATION.

Form No. 531.

ESTATE INSOLVENT.

Defendant states :—

1. That A B died insolvent ; he was entitled at his death to some immoveable property which the defendant sold, and which produced the nett sum of Rs. , and the testator had some moveable property which the defendant got in, and which produced the nett sum of Rs.

2. That defendant applied the whole of said sums, and the sum of Rs. , which the defendant received from rents of the immoveable property, in the payment of the general and testamentary expenses, and some of the debts of the testator.

3. That defendant made up his accounts, and sent a copy thereof to the plaintiff, on the      day of      18 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of defendant's offer.

4. That defendant submits that the plaintiff ought to pay the costs of this suit.

### CHAPTER II. DIVORCE.

Form No. 532.

DENIAL OF ADULTERY.

Defendant states :—

That she denies that she has on divers or any occasions committed adultery with X Y as alleged in the plaint.

## Form No. 533.

## CONDONATION.

PART II.  
Defences.DIV. IV.  
Suits for  
Special  
Relief.

Defendant states :—

2. That after the time mentioned in the plaint, and before this suit, the plaintiff, being informed as to the matters therein alleged, freely condoned and forgave the defendant thereof (and freely cohabited with him).

2. That ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

**Condonation Defined.**—Condonation is forgiveness of a conjugal offence, with full knowledge of all the circumstances ;\* it is a question of fact, not of law.†

There can be no condonation without renewed cohabitation, which, however, does not mean renewed sexual intercourse.‡

## Form No. 534.

## ALLEGATION OF REVIVAL OF ADULTERY CONDONED.

That even if she had condoned the said adultery, the same has been revived by the subsequent (state offence) of the respondent:

**Revival.**—Condonation means forgiveness with a condition, that is, a condition that the party in the wrong shall not again commit a similar act, in which case the previous wrong condoned is revived by the subsequent wrong.§ and the subsequent offence need not be *ejusdem generis* as the offence condoned.¶

Where the husband has condoned his wife's adultery, subsequent misconduct tending to, though falling short of, adultery, revives the condoned adultery.¶

## Form No. 535.

## EXCUSE FOR REFUSING TO COHABIT.

Defendant states :—

1. That he denies that he has, without any lawful excuse, withdrawn from bed, board, and mutual cohabitation with the plaintiff.

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\* *Dempster v. Dempster*, 31 L. J., P. and M., 20.

† *Peacock v. Peacock*, 27 L. J., P. and M., 71.

‡ *Keats v. Keats*, 28 L. J., P. and M., 57 ; see Divorce Act, 1869, s. 14.

§ *Dent v. Dent*, 34 L. J., P. and M., 118.

¶ *Durant v. Durant*, 1 Hogg 765 ; *Palmer v. Palmer*, 29 L. J., P. and M., 124.

¶ *John Francis Pereira v. Helen Charlotte Pereira*, 1 L. R., 5 Mad. 118

PART II.  
Defences.Div. IV.  
Suits for  
Special  
Relief.

2. That on the       day of       18       , before he withdrew himself from bed, board, and mutual cohabitation with plaintiff as in the  
 plaintiff alleged, the respondent discovered that the plaintiff had, on the  
 day of       18       , committed adultery with one M N at       .

**What is Good Excuse.**—Legal ground in section 32 of the Divorce Act, 1869, means a matrimonial offence, such as adultery, cruelty, &c., and nothing shall be pleaded in answer which would not be ground for a suit for judicial separation, or a decree of nullity of marriage.\*

**Deed of Separation—No Bar.**—The existence of a deed of separation is no bar to a suit for restitution of conjugal rights;† but when the separation has been executed for valuable consideration a Court of Equity will grant an injunction to restrain the party from suing for restitution of conjugal rights.‡

## CHAPTER III.

## FORECLOSURE AND REDEMPTION OF MORTGAGES.

## Form No. 536.

## DENIAL OF MORTGAGE BY PURCHASER FROM ALLEGED MORTGAGOR.

Defendant states:—

That he denies that the said (alleged mortgagor) at any time executed said alleged bond or mortgage, and denies that the said (alleged mortgagor) at any time assigned said alleged bond or mortgage to the plaintiff, and denies that plaintiff is now the owner or holder of said alleged bond or mortgage.

## Form No. 537.

## DENIAL OF NOTICE.

Defendant states:—

That the plaintiff did not cause his said mortgage to be registered as alleged, or at all, and this defendant had not notice, actual or constructive, of the existence of the plaintiff's said mortgage, at or before the time this defendant took his said conveyance.

\* S. 33.

† Crabb v. Crabb, 37 L. J., P. and M., 45; Spering v. Spering, 32 L. J., P. and M., 116; Hunt v. Hunt, 32 L. J., P. and M., 163.

‡ Hunt v. Hunt, 31 L. J., Ch., 161.

Form No. 538.

MORTGAGE NOT ASSIGNED.

Defendant states :—

That the said A B did not convey all his right or title, as such mortgagee, in and to the said premises, in manner and form as the plaintiff has in his plaint alleged, or at all.

PART II.  
Defences.

DIV. IV.  
Suits for  
Special  
Relief.

Form No. 539.

NON-JOINDER OF MORTGAGOR.

Defendant states :—

That after the execution of the said mortgage in the plaint described he conveyed said mortgaged premises to one A B, who is now living, and still holds said title.

Form No. 540.

EQUITY OF REDEMPTION NOT ASSIGNED.

Defendant states :—

That the said A B did not convey his equity of redemption in and to the said premises in the plaint described, in manner or form as the plaintiff has in his plaint alleged, or at all.

CHAPTER IV.

PARTITION.

Form No. 541.

PENDENCY OF SUIT TO DISSOLVE PARTNERSHIP.

Defendant states :—

That the premises of which the plaintiff seeks partition were purchased by the plaintiff and defendant as partners, with partnership funds, and for partnership purposes, in carrying on and conducting the business of (merchants) as such partners, and the same is still so used for said purposes; and that prior to the commencement of this suit, to wit, on the        day of        18       , this defendant commenced a suit in the Court of        against this plaintiff for a dissolution of the said partnership, and an accounting, and which suit and accounting involve the property described in the plaint, and which suit is still pending and undetermined.

PART II.  
Defences.DIV. IV.  
Suits for  
Special  
Relief.

## CHAPTER V.

## PARTNERSHIP.

## Form No. 542.

## THAT TERM IS NOT EXPIRED.

Defendant states :—

That the partnership between him and the plaintiff was not upon the terms and according to the stipulations and agreements alleged by the plaintiff in his plaint; but, on the contrary, that said partnership was formed and entered into, and carried on, under and in pursuance of a written agreement of partnership, a copy of which is hereto annexed, and forms part of this written statement, showing that the time for the continuance of said partnership is not yet expired.

## Form No. 543.

## OVERDRAWING BY PLAINTIFF'S ASSENT.

Defendant states :—

That he denies each and every allegation set forth in the plaint, relative to the alleged misconduct of defendant, and his alleged acts and doings in the management of the said partnership business, except the allegation of his drawing out from the funds of the said partnership more than his portion of the profits thereof, to wit, the sum of Ra. , and as to such allegation, defendant alleges and states that it was done with the full knowledge of the said plaintiff, and with his approbation and express consent.

## CHAPTER VI.

## QUIETING TITLE.

## Form No. 545.

## DENIAL OF PLAINTIFF'S TITLE AND ADVERSE POSSESSION.

Defendant states :—

1. That the plaintiffs claim title to the land described in the plaint as heirs and devisees of one A B, deceased.
2. That the said A B in his lifetime, to wit, on the      day of 15 , conveyed, by an instrument in writing, hereunto attached,

and marked Exhibit No. 1, to defendants, grantors, the land in the  
 plaint described, and that, after such conveyance, said A B never had,  
 nor have the plaintiffs or any of them since had, nor have they now,  
 either as heirs or devisors of the said A B, or otherwise, any right, title,  
 or interest in or to said lands, or any part thereof.

PART II.  
 Defences.  
 Div. IV.  
 Suits for  
 Special  
 Relief.

8. That defendant further alleges that he has been in the quiet  
 and peaceable possession of the said lands, and claiming adversely to  
 the said plaintiffs, and adversely to all other persons, for more than  
 twelve years before the commencement of this suit.,

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## CHAPTER VII.

### RESCISSION AND CORRECTION OF INSTRUMENTS FOR FRAUD AND MISTAKE.

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#### Form No. 545.

#### DENIAL OF FRAUD.

Defendant states:—

That he denies that he obtained the said document from the plaintiff  
 by fraud or misrepresentation (deny specific acts alleged).

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#### Form No. 546.

#### DENIAL OF MISTAKE.

Defendant states:—

That he denies that there are any errors or mistakes in the stating  
 of the said account, as alleged, or at all, but alleges that the account  
 stated, which is mentioned in the plaint, is correct, true, and just.



PART II.  
Defences.

DIV. IV.  
Suits for  
Special  
Relief.

## CHAPTER VIII.

## SPECIFIC PERFORMANCE.

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Form No. 547.

## DENIALS.

Defendant states :—

1. That he did not contract and agree with the plaintiff in manner or form as alleged in the plaint, or in any manner or form, or at all.
2. That the plaintiff did not pay to the defendant the said sum of Rs.                      , in manner or form as he alleges, or at all.
3. That the plaintiff did not tender the said sum of Rs.                      to the defendant at the time specified, or at any time.
4. That the plaintiff did not put the defendant into possession of said premises at the time stated, or at any time.
5. That the plaintiff was not the owner of said premises, and could not make to the defendant a good and sufficient title thereto, as by his contract he was bound to do ; but, on the contrary (state incumbrances).

---

Form No. 548.

## RESCISSION OF CONTRACT BY CONSENT.

Defendant states :—

That after the contract alleged in the plaint, and before any breach thereof, it was agreed between the plaintiff and defendant that the said contract should be waived, abandoned, and rescinded ; and they then waived, abandoned, and rescinded the same accordingly.

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